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ABSTRACT

This booklet consists of seven articles intended to introduce new school board members in Texas to the formation and implementation of educational policy, with particular emphasis on the legal requirements governing policy-making and other school board activities. The articles include the following: "Policy Development: An Overview," by Richard L. Hooker; "School Board Member Liability," by Lanier Cox; "Wood v. Strickland: An Analysis," by G. Ross Smith; "Hard Choices in School Discipline," by Arthur A. Kola; "Corporal Punishment: Update 1976," by Kelly Frels; "Exclusivity v. Individual Rights," by Ellen Anderson; and "School/Community Relations," by Larry Ascough. (JG)

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POLICYMAKING

A Challenge for School Board Members

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ELLEN ANDERSON, Editor

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Education is increasingly governed by law, the basic concepts of which are specific. It is a reasonable corollary that basic policies for school boards must also be simply stated and specific.

—Robert F. Andree—

Policymaking is the primary function of the school board. The concept is simple, the charge is simple, but the process is complex. Written policies are the guidelines for operation of the schools; thus boards of trustees must be continually aware of changes that affect the policies which determine the operation of the schools.

According to provisions of House Bill 1126, 64th Legislature, every school district in Texas must be accredited by the Texas Education Agency by the 1977-78 school year. A major consideration in the accreditation process is that "a board of trustees has developed, codified, duplicated, and disseminated to all school employees and the public, the policies that govern the operation of the school."

This handbook is designed to introduce new board members to what policymaking involves. Who makes policy, who implements it, what parameters are set by law, and what determines the need for written policies?

EFA

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RICHARD L. HOOKER, Ph.D.

An Introduction to Policy Development

What is a policy?

In its simplist form a board policy is a statement of expectation. It indicates what the board desires and, if necessary, specifies the extent, degree, amount, etc. Written policy, therefore, serves a function similar to that of architectural drawings. Without blueprints a contractor would not know what to build.

If policy is really that simple, it would appear that boards of education would have no difficulty in developing an understanding of what policy is and how important it is to a school system. It is not simple! It is an extremely complex task and there is a fine line between the domain of board policy and that of administrative rules and regulations.

Administrators frequently complain that board members do not adhere to the established, accepted role of the board: (1) *establishing policy*, (2) *employing the superintendent*, (3) *reviewing and approving administrative plans for implementation, and* (4) *evaluating both the effectiveness of implementation and the wisdom of continuing a policy.* It is reported that board members have a tendency to stray into administration. Once policy has been established, implementation becomes a jealously guarded prerogative of the administrator.

Whether board intrusions into the area of administration are stimulated by ulterior motives or are fostered by a lack of understanding is beyond the scope of this introductory section. It is, however, necessary to contrast administrative procedures, rules, and regulations with policy.

The following examples offer an opportunity to differentiate between the two:

POLICY

Teaching Experience Program for High School Seniors

The _____ Independent School District shall provide for a teaching experience program in order to benefit the District's elementary school teachers, elementary school children, and, most important of all, to help college-bound high school seniors decide for or against a career in education.

The Superintendent shall establish procedures for this program.

ADMINISTRATIVE REGULATION

Teaching Experience Program for High School Students

The teaching experience program for high school seniors operates in accordance with the following regulations:

(1) Assignment of Teaching Responsibilities

The high school senior may be assigned to:

(1-1) give individualized instruction within a subject area;

(1-2) reinforce the cooperating teachers' efforts to teach skills;

(1-3) assist the student with "seatwork" or "home" assignments;

(1-4) prepare and teach lessons under the supervision of the cooperating teacher;

(1-5) assist in readying materials, bulletin boards, and audio-visual equipment; and,

(1-6) grade papers and keep records.

(2) Credit and Grades

The program is a quarter plan with three credits. The grade is determined by theory tests and special projects for theory class plus an evaluation made by each cooperating teacher.

(3) Admission Prerequisites

The prerequisites for each student participant are that he or she:

(1-1) must be a senior;

(1-2) must have sufficient credits toward graduation to allow this elective;

(1-3) must have genuine desire to be a teacher; and

(1-4) must have a good scholastic record.

(4) Program Cost and Financing

There is no cost to the District other than the first period of instruction. Students assume responsibility for transportation to work experience assignments.

It can be seen from the preceding examples that board policy sets the direction and the distance while administrative regulations determine *how* the board's intent is achieved.

Developing carefully written board policies and administrative procedures, rules, and regulations is a laborious, tedious task. As a consequence, relatively few boards have disciplined themselves and their superintendents into rigorous, continuing policy development with the accompanying development of administrative procedures, rules, and regulations.

Why are policies needed?

Direction

Inherent in the definition presented above is the primary indication of need. How can a board expect its superintendent to implement effectively if board expectations have not been clearly delineated? In the absence of policy, it is not uncommon for a superintendent to think that he is on a Sunday drive with the board. He steers the car in directions that he would like to go only to find the board extremely disgruntled. If the board has failed to state its purpose for the trip, it has only itself to blame; however, superintendents frequently are terminated or severely disciplined (no raise or extension of contract, etc.) for not having somehow intuitively known the collective expectations of at least a majority of the board. To achieve congruence between the board's expectations of superintendent behavior and his actual performance, the board must establish and continually update a comprehensive set of policies.

Renewal and Accountability

In addition to the superintendent and the staff, many other individuals and groups have a right to know what course has been selected to guide decision making. Present and future directions of the school system affect the lives of nearly all the citizens of a district. Students and their parents are both more vocal and more inquiring. Taxpayers want to know what kind of results are being achieved with their hard-earned tax money.

This mood is being expressed throughout the nation in demands for renewal and accountability. Within the past ten years, and largely within the last five years, over two-thirds of the states have enacted accountability legislation; and the other states now have accountability proposals before their legislatures. This movement has been stimulated by a combination of higher school taxes and lower basic skills test scores. Many citizens also perceive the school systems as groping almost without direction through one expensive fad after another. As a result, the need to restore credibility in the public schools is paramount; and renewal and accountability systems must be implemented as the basis for restoration.

The foundation for any renewal and accountability system is evaluation—evaluation of all programs and personnel. It is impossible to evaluate without having standards and expectations embodied in board policy. The superintendent and his staff caanot be held accountable unless the board can specify **for what**.

Board members frequently vocalize extensive rhetoric calling for accountability on the part of the superintendent, central administration, and teachers, while asserting that board members face the true test of accountability at the polls. How can the public judge the performance of the board if it is unaware of the policies established and/or perpetuated by the board? Further, to evaluate a board member's performance, a citizen would need to know the individual member's voting record on policy issues. Under such circumstances, it would appear necessary that the board make every effort not only to develop good policy, but to disseminate information regarding the system's policies.

Since the citizen is being represented by the board member, knowing about policy after it has been established is inadequate. Public opinion regarding an issue should be given careful consideration by anyone who claims to represent the people. It would, therefore, behoove the board to publicize the intent to deal with a major policy matter prior to formal adoption in order that the public may have an opportunity to make its wishes known to the board.

Involvement and Commitment

Even if board members do not value the public's right to know, they should realize that those who are affected by a policy decision are generally more supportive of the policy if they have participated in the decision-making process. Public understanding and support are ingredients that are necessary to goal achievement .

In generating greater public commitment to board policy, many school boards have found the use of ad hoc advisory committees an invaluable resource. Several cautions, however, should be noted:

(1) *appoint the committee* for a specific task within a specific time frame;

(2) *delineate carefully the task* that is to be performed by the committee;

(3) *select the individual members* very carefully to insure that the committee will be broadly representative of those persons who will be affected by the policy decision;

(4) **do not ask for the recommendations of an advisory committee unless the board wants that type of input.**

The use of this approach to public involvement in the development of public policy is sometimes abused. In an attempt to manipulate public opinion, advisory committees are appointed and spoon fed "information" which the board knows will lead to a predetermined conclusion. Another abuse is assigning busy work to

perceived troublemakers when an expression of opinion is not really desired by the board. Both of these abuses have generally resulted in great damage to the board's credibility with the committee members and the elements of the community that they represent.

Those who are skeptical of broad-based involvement in policy development usually voice the concern that the board will abdicate its legal responsibility to establish policy. Other opponents of the process fear that the complexity associated with the selection and operation of advisory committees will make the risks prohibitive. These fears have legitimate bases; however, most policymaking boards find that the advantages make it worth the risks.

Efficiency

In today's society, each individual case or problem cannot be handled as a seperate issue without bogging down board operations in a bottomless mire. Comprehensive written policies greatly improve the efficiency of operation by providing structural responses. Many of the day-to-day problems can be resolved by student, parent, teacher, and/or administrator reference to board policy. When accompanied by an administrative appeals process, clearly delineated policies, which have been subjected to thorough legal review, can prevent a multitude of problems from reaching the board and consuming valuable time.

In addition to problems associated with student discipline and teacher dismissal, indirectly referred to in the prior paragraph, logic would lead one to conclude quickly that the program goals of the board can be more efficiently implemented if they are explicit in policy. The cost of false starts in wrong directions because of the lack of clarity in board policy is a waste of time and money —the expense of which is not easily estimated. The amount wasted, however, would appear to be great but whatever the cost, indefensible.

Continuity

Without written policy it is difficult to maintain continuity in decision making. While rigidity is an unreasonable position in the rapidly changing context within which schools must function, the lack of written policy contributes to the vacillation and abrupt shifts among alternative positions.

With rapid turnover in board membership, policies offer an even more greatly needed thread of continuity. Written policies tend to cause a board to think through a problem very carefully before making changes. This is particularly true when board policies include the requirement of reasonable time intervals between the proposal of a policy change and a board vote on the issue.

Myriad changes in the context of board operations have increased the relative importance of continuity considerations. Foremost

among these is the suit syndrome. If a school district is not presently involved in litigation, it either has been recently or soon will be. Generally a school district's best defense in court is proof of a widely disseminated, rational policy, accompanied by administrative regulations which have been followed consistently in dealing with similar prior occurrences.

Another development which makes well-drawn policies mandatory is the advent of militant teacher behavior and/or negotiations. At this time, many school systems have yet to feel the direct impact of this trend; however, the sequence of events in many other states suggest that it is inevitable even in the smallest of school districts. If a school board has been thorough in its efforts to establish and maintain effective policies, the precedent of operation under such policies places a substantial burden on those who seek to change them. A policy inherently must be proven illegal, ineffective, or inadequate in order for modification to become the subject of negotiations.

How Are Policies Developed and Updated?

In the absence of an organized, maintained policy manual, school board policies exist in the minutes of board meetings. As a consequence, the first effort must be an analysis of board actions subsequent to the publication date of the board policy book. Since reviewing the recorded actions of the board is a time-consuming but necessary task, it usually forces a decision regarding professional assistance.

Although many other organizations have entered the policy development field, the TASB Executive Committee decided that a model policy program specifically designed for Texas school districts was needed. Therefore at the January 1976 meeting, the Executive Committee directed the TASB staff to formulate a basic policy manual for Texas school board members and administrators. In conjunction with the directive, the Committee encouraged the staff to develop evaluation and workshop modules for use in explaining and reviewing the policies, and an update service which will also be available to Texas school districts.

This service is now available to Texas school officials.

LANIER COX

School Board Member Liability

The *Wood v. Strickland*[1] case, decided by the United States Supreme Court last February, by increasing the possibility for personal liability in damages for official acts has caused consternation to board members and administrators at all levels of public education in this country. This decision weakened considerably the individual protection previously afforded policymakers and administrators acting within their official roles and exposed these individuals to personal liability for monetary damages for violation of the constitutional rights of students. The principles enunciated by the Court could apply as well to protect teachers and other employees.

Specifically, the Court stated that:

> . . . in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under §1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.[2]

Board members are obligated to recognize and to protect both the substantive rights and the procedural due process rights of students (and teachers and other employees).

Three quotations from Mr. Justice Powell's dissent (joined by Messrs. Chief Justice, Justice Blackman, and Justice Rehnquist) indicate his evaluation of what the Court has done to the concept of qualified immunity previously protecting board members in their official actions:

> This harsh standard requiring knowledge of what is characterized as "settled, indisputable law," leaves little substance to the doctrine of qualified immunity.[3]

> These officials will now act at the peril of some judge or jury subsequently finding that a good-faith belief as to the applicable law was mistaken and hence actionable.[4]
>
> In view of today's decision significantly enhancing the possibility of personal liability, one must wonder whether qualified persons will continue in the desired numbers to volunteer for service in public education.[5]

To protect themselves, boards should adopt policies and regulations which clearly delineate the rights and responsibilities of students and teachers in accord with the latest pronouncements of the United States Supreme Court and, in Texas, with the holdings of the Court of Appeals for the Fifth Circuit. And such policies and regulations must be kept current with new decisions of these courts as they are made.

Procedural Due Process Rights

For example, in the area of procedural due process rights of students, the Supreme Court in January of 1975 in the *Goss v. Lopez*[6] case held

> . . . in connection with a suspension of 10 days or less that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.[7]

Prior to that case most of the court of appeals cases on the subject had held that in connection with such short suspensions, students had no rights to due process. Since that decision, any board that does not have a written policy requiring building principals to accord all students (with limited exceptions) at least these minimum rights is exposing its members to potential personal liability under the *Wood* case.

The Court in the *Goss* case expressly limited its holding to suspension of 10 days or less but cautioned that

> Longer suspensions or expulsion for the remainder of the school term, or permanently, may require more formal procedures.[8]

Left unanswered by the Supreme Court are the many procedural questions involving suspension of longer than 10 days such as rights against self-incrimination, right to counsel, right to cross examination, to which the lower federal courts of appeals have not given consistent answers.

Even in the instance of suspension of 10 days or less the court, in *Goss*, did not

> . . . put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required.[9]

The intervention of the federal courts in these recurring discipline situations makes essential the existence of clearly stated board policies implemented by carefully drafted school regulations if potential liability is to be minimized.

Substantive Constitutional Rights

In the area of substantive rights of students, one example would involve the rights of students to distribute handbills, underground newspapers, or other forms of written expression on or near school premises. Two cases decided by the Court of Appeals for the Fifth Circuit (*Shanley v. North East Independent School District, Bexar County, Texas*,[10] and *Sullivan v. Houston Independent School District*)[11] provide limitations on the authority of the school board and procedures for the protection of the first amendment rights of the student. In the absence of clearly drawn policies consistent with the letter and spirit of these decisions, school boards are exposing their members to personal liability. Similar first amendment problems arise in regard to students' rights to freedom of speech, freedom of assembly, freedom of association, etc. In some instances involving these first amendment rights, the Supreme Court or other federal courts have given guidance, but in others, the issues are at best vague or still unresolved.

Summary

In the pamphlet entitled *School Board Member Liability* published by the Texas Association of School Boards in the fall of 1975, Russell R. Graham gave an excellent summary of the problems of possible liability for school board members by stating that:

> In order to avoid this potential liability, school trustees must make every effort to maintain school policies which reflect current law. More important, they must make every effort to apply these policies in a fair and reasonable manner. Though every school trustee is exposed to potential liability, this potential can be minimized by any board which is willing to make a sincere effort to remain informed and to base its decisions on the actual needs of the school district.

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[1] *Wood v. Strickland*, 95 S. Ct. 992 (1975).
[2] *Id.* at 1001.
[3] *Id.* at 1004.
[4] *Id.*
[5] *Id.* at 1005.
[6] *Goss v. Lopez*, 95 S. Ct. 729 (1975).
[7] *Id.* at 740.
[8] *Id.* at 746.
[9] *Id.*
[10] 462 F 2d 960 (5th Cir. 1972).
[11] 333 F. Supp. 1149 (S.D. Tx. 1971), rev. 475 F. 2d 1071 (5th Cir. 1973).

G. ROSS SMITH

Wood v. Strickland: An Analysis

The effect of the recent Supreme Court ruling in *Goss v. Lopez*[1] will be felt immediately in school districts throughout the country. Procedures provided for the processing of short-term suspensions of students must be reviewed and adapted to conform to the procedural due process requirements enunciated in the Court's opinion. However, unlike the situation in *Goss*, the full implications of *Wood v. Strickland*,[2] the second significant school ruling in the Court's 1974 term most probably will not be realized fully until the rationale of the case has been invoked in litigation and construed by the courts. The ramifications of the case are nevertheless easily recognizable as potentially momentous. Many assessments have already been made and the predictions so far seem universally and unequivocally unfavorable for school administrators and board members. This brief discussion will deal with those aspects of the case which are likely to yield undesirable results for school officials. It also will explore whether there is any basis for optimism in the area of school officials' liability in student suspension cases. You should be cautioned that, to some extent at least, my perspective is most likely distorted—attorneys do not like to predict totally dire consequences from cases they have personally argued. The obvious tendency is to look for "something good" in the result they have helped to bring about.

There were, and are, many issues in the case. This discussion will deal with only two such issues. The first involves the question of under what circumstances, if any, a public school board member may be required to respond in damages to a student who challenges a suspension or expulsion in a suit under 42 U.S.C. §1983. The second involves the Court's consideration of the extent to which federal

courts are authorized to intervene in suspension decisions.

The liability question was actually answered several times in slightly varying language during the course of the majority opinion. The language I like best is as follows:

> A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.[3]

It should be observed that the Court is speaking about two different types of circumstances. The first involves a violation of what the Court refers to as a "clearly established constitutional right" or "settled, undisputed law."[4] In this category of offenses, the school board member's liability is not determined by an inquiry into his motivation—liability is virtually absolute. The second category consists of all other types of student suspensions—those not involving any constitutional right at all and those involving some alleged constitutional right but not one which may properly be characterized as a clear, undisputable one. In this group, which should encompass the vast majority of suspension cases, the board members liability *is* determined by reference to his motivation. Basically he must be acting sincerely and with a belief that he is doing what is best for the educational system which he serves. Unless the student can demonstrate a malicious intent to do harm, he cannot recover damages. For this reason, i.e., the requirement of proving malice, the latter category of cases should not be of major concern to properly motivated school officials.

The obvious hazard to school officials lies in the requirement that they be able to determine when a student is about to be deprived of a "clearly established constitutional right" in violation of "settled, indisputable law." And it is this feature of the majority opinion which evokes a vigorous dissent by four Justices. It seems to me that the dissent's basic objection is to the imprecision of the guidelines provided—how can a board member be expected to know when or if a constitutional right is "clearly established" and who is to determine whether a particular right properly falls within that category (perhaps a lay jury?). Writing for the dissent, Mr. Justice Powell suggests that the effect is to prescribe a more severe standard of liability on school board members than on other governmental representatives whose conduct is normally tested by whether there were reasonable grounds to have acted as they did (without reference to whether a constitutional right was infringed) and whether they entertained a good faith belief that they were doing right. Perhaps Mr. Justice Powell is reading too much into the majority opinion. In actuality, it seems unlikely that one could violate a "clearly established constitutional right" (the *Wood v. Strick-*

land test) and still be deemed to have acted "reasonably" (Mr. Justice Powell's test). If in fact, the test prescribed by the majority is incapable of logical application, Mr. Justice Powell may have a valid point. However, it may not be as difficult as the dissent expects to determine what constitutional rights are indisputably owing to students. Certainly freedom from overt racial discrimination would be one. First Amendment rights of speech and association, absent a real threat of material disruption of the educational program would also be included. In some federal circuits, including the Eighth, the right to wear one's hair as he pleases would be another. Essentially what will be required is a devotion on the part of school board members to know and respect those rights to which students are clearly entitled. Where entitlement is not so clear, board members should be insulated from personal liability as long as they act in what they reasonably believe to be in the best interests of the educational system.

One important and favorable aspect of *Wood* seems to have been largely ignored, at least to this point. It may be a significant step in curtailing the tendency of students to resort to *federal* court with grievances against board members. The Court in *Wood* specifically held that federal courts may not intervene in school disputes merely to correct an erroneous decision, an unwise decision or one lacking in compassion. To be properly assertable in a federal court, the student's grievance must "rise to the level of violations of specific constitutional guarantees."[3] Thus, as in the *Wood* case itself, jurisdiction was not properly exercised to resolve evidentiary questions arising in school disciplinary proceedings, nor to set aside a school board's interpretation of one of its own rules. Hopefully, many student suits will now be channeled into the various state judicial systems. It seems fair to suggest that that is actually where such cases belong since the recognition (admittedly somewhat eroded) that theory and practice in public educational systems are matters of local, not federal, concern is still fundamentally sound.

Reprint, Journal of Law and Education, Vol. 4, No. 4, October 1975.

[1] 419 U.S. 565, 95 S. Ct. 729 (1975).

[2] 420 U.S. 308, 95 S. Ct. 992 (1975).

[3] *Id.* at 322, 95 S. Ct. at 1001.

[4] *Id.* at 321–22, 95 S. Ct. at 1000–01.

[5] *Id.* at 326, 95 S. Ct. at 1003.

ARTHUR A. KOLA

Hard Choices in School Discipline

Goss v. Lopez[1] has been hailed as a landmark victory for students' rights. It is my position that the decision is neither a victory nor good law. In fact, a case can be made that, on close examination, *Goss* is really a mild victory for those seeking to preserve the traditional relationship between school authorities and students. Certainly, the plaintiffs' attorneys would agree that they fell far short of getting what they really were after when the case was originally filed.

Just what was at stake is apparent from a brief history and background of the case. *Goss v. Lopez* arose from student unrest and racial demonstrations in some Columbus, Ohio, secondary school during the late winter of 1971. The disturbances occurred in the classrooms, and spilled into the study halls, hallways, and schoolyards of some of the schools in the system. The disruptions of the educational process were clear. In order to quell the disturbance, school administrators sent students home for up to ten days.

Some of the students sent home were directly involved in the disturbances, some only peripherally, and some not at all, according to evidence later introduced in the district court trial. As to the direct participation of some of the students sent home, the evidence spread on the record of the trial court is unchallenged. There was testimony from one principal, for example, that one of the students was suspended after he attacked a Columbus police officer while being removed from an auditorium in which he was causing a disturbance. This apparently is the kind of situation to which Mr. Justice White referred, in the majority opinion in *Goss*, when he said a student whose offense has been witnessed by the disciplinarian is still entitled to a hearing because "things are not always as they seem to be. . . ."[2]

Additional important background to the case is an Ohio statute[3] which sets forth detailed procedures to be followed *after* a school principal or school district superintendent suspends a student from school. The suspension could not and cannot be for longer than ten days. Notice of the suspension and of the reason for it must be supplied in writing to the parents of the student and to the Board of Education within 24 hours of the suspension. The statute was and is altogether silent, however, as to procedures to be followed by the school disciplinarian *before* suspending, or for that matter expelling, a student from school.

The background leading to the Supreme Court's decision would be incomplete, however, without looking to the complaint filed in the U.S. District Court, on behalf of nine suspended students, in 1971. A look at the complaint discloses just what the people supporting the suit were after and what their ambitions were. In retrospect, it also provides a basis for measuring just how much was finally achieved.

What the complaint asked for, among other things, was written statements of reasons for suspension before disciplinary action was taken; a right to launch discovery proceedings before any disciplinary hearing; a right to submit evidence in support of an accused student through witnesses other than the accused; a right to confront and cross-examine accusing witnesses; and a right to representation by counsel before a student could be suspended even for a single day. It seems fair to say the complaint really sought to gut suspension, as we know it today, as an immediate, effective tool for the maintenance of order by school authorities or, as Mr. Justice White calls it, "a valuable educational device."[4]

The results obtained in the Supreme Court, or in the three-judge district court for that matter, fall far short of what the complaint was after. The outcome, in fact, bears only the slightest resemblance to what the complainants and their supporters hoped to achieve. Protecting its flank, the Supreme Court majority said some of the things asked for in the complaint might be required for short suspensions "in unusual situations."[5]

In the normal case of a short suspension, not exceeding ten days, however, nine justices of the Supreme Court seem in solid agreement that the suspension need not be preceded by a written statement of reason; an oral statement of the charges will do. Moreover, there is no right to pre-disciplinary discovery proceedings, nor to representation by counsel, nor to confront and cross-examine witnesses supporting the charge, nor to call witnesses in support of the accused student's version of the facts.

In the words of Mr. Justice White, speaking for a bare Supreme Court majority, a student faced with a suspension of ten days or less is entitled, absent "unusual situations," to this and nothing

more: ". . . oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story."[6] What's more, the notice and hearing can take place *after* the student's removal from school if the student's "presence poses a continuing danger to persons or property or an ongoing threat of disrupting the educational process. . . ."[7]

Despite the watered-down holding in the case, *Goss v. Lopez* is bad law. It is bad for many reasons, but the worst of these are the suits that can be expected to follow in its wake and its implications for future relationships between students and school authorities.

Lawsuits down the road will attempt to build, at the very least, on the "unusual situations" exception suggested in Mr. Justice White's majority opinion. After all, what "situation" isn't "unusual" in the mind's eye of a resourceful plaintiff's attorney bent on smothering a rule with exceptions? Claims will certainly abound that the student suspended just before graduation, or just before examination time, or even before the "big game" is entitled to protections beyond those provided in the usual situation.

Lawsuits also will be pressed to extend the due process concept beyond suspensions and expulsions to other routine school decisions. After all, if a suspension even for one day ". . . with all its unfortunate consequences"[8] requires constitutional due process, it is hard to argue that the college-bound honor student who suffers the "unfortunate consequences" of flunking or getting a low grade in a high school course is not entitled to similar protection from the discretion and judgment of the grading teacher. And if the "psychological injury" resulting from suspension requires constitutional protection of the student, what about protecting the student from the "psychological injury" that results when he or she is cut from the football, cheerleading, or debating team? This is the kind of thicket Mr. Justice Powell warns against in his penetrating dissent[9] and into which future litigation, based on the majority decision in *Goss*, may go.

For more than any other reason, *Goss v. Lopez* is bad law because of the mold into which it promises to cast and harden relationships between students and school authorities in the future. The mold, of course, is the pre-form of due process announced by the Supreme Court in the case. School districts across the country are carefully rewriting their suspension procedures, or are writing suspension procedures for the first time. This is being done, of course, with a copy of the majority opinion in *Goss* turned open to its due process requirements.

There can be little doubt, that the result of this massive rewrite job will be a dutiful but minimal spelling out of the due process requirements announced in *Goss*. In fact, many of the procedures

will track verbatim the very words used by Mr. Justice White in the majority opinion. The end product of all this may be an elevation of the procedure announced by the *Goss* majority into *The Procedure*. There will be exceptions, of course, among school boards across the country. In most school districts, however, the due process mold will have hardened. Students will get *The Procedure*, neither more nor less, and relationships between students and school authorities will be cast in the form of constitutional confrontation.

This elevation of form over substance may not be a good thing, but fighting it may be a losing battle because of decisions like *Wood v. Strickland*,[10] which dictate adherence to constitutional form, under penalty of personal liability, for disregarding a student's established constitutional rights. Suspension procedures, after all, are usually adopted by boards of education whose members typically are not professional educators or constitutional lawyers. Faced with the prospect of a *Wood v. Strickland* liability, a school board member can hardly be blamed for insisting on a procedure that is *The Procedure*, neither more nor less, and then insisting on adherence to *The Procedure*, neither more nor less, once it has been adopted.

The battle also may be a losing one because professional educators, school administrators and teachers consider the monitoring and disciplining of students to be their least desirable duty. Adopting *The Procedure* announced in *Goss*, and sticking to *The Procedure*, neither more nor less, allows rank-and-file teachers to perform this duty in a prefunctory and minimal fashion.

In closing, it seems fair to say *Goss v. Lopez* was decided the way it was because the Supreme Court majority wanted to humanize relationships between students and school authorities. This is apparent from the majority opinion's expressed hope for a "give-and-take between student and disciplinarian. . . ."[11] By curbing the discretion of school authorities and hardening the due process mold, the Supreme Court may have achieved just the opposite result.

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[1] 419 U.S. 565, 95 S. Ct. 729 (1975).
[2] *Id.* at 584, 95 S. Ct. at 741.
[3] OHIO REV. CODE §3313.66 (1972).
[4] 419 U.S. at 580, 95 S. Ct. at 739.
[5] *Id.* at 534, 95 S. Ct. at 741.
[6] *Id.* at 581, 95 S. Ct. at 740.
[7] *Id.* at 582, 95 S. Ct. at 740.
[8] *Id.* at 579, 95 S. Ct. at 739.
[9] *Id.* at 597–98, 95S. Ct. at 747–48.
[10] 420 U.S. 308, 95 S. Ct. 992 (1975).
[11] 419 U.S. at 584, 95 S. Ct. at 741.

KELLY FRELS

Corporal Punishment—Update '76

Introduction

Corporal punishment as a disciplinary technique is being reexamined by boards of education, citizen advisory groups, scholars, and educational organizations. Reports and articles which result from these studies usually criticize the use of corporal punishment, and the abuses to which some students are subjected are prominently noted.[1] Even with this criticism, only New Jersey and Massachusetts prohibit the use of corporal punishment by statute. It is, however, proscribed by State Board regulation in Maryland and by local board resolution in Washington, D. C.[2]

While the public acceptance of corporal punishment as a disciplinary tool is being analyzed, the use of this disciplinary measure is being scrutinized in the courts.[3] Since the initial federal court decision in *Ware v. Estes*, other courts have been required to review other contests involving the imposition of corporal punishment. The results of these suits have varied, as have the facts, and definite legal guidelines regarding corporal punishment are probably far from being finally developed.

This article will provide a brief review of the development of corporal punishment as a disciplinary technique with particular emphasis on Texas law. Minimal attention will be given to a categorization of the numerous reported cases from other states.[4] Recent litigation contesting physical punishment on grounds of its being cruel and unusual will be discussed. Other new cases in which the respective rights of students and parents vis-a-vis those of the school officials will be reviewed. The necessity for observing procedural due process before the administration of corporal punishment will also be considered. Projections on possible additional litigation will be given; and in conclusion, suggestions will be offered on what elements should be considered for inclusion in a school district corporal punishment policy.

Authority for the Use of Corporal Punishment—Generally

The authority of a teacher to use corporal punishment as a disciplinary technique is an element of the common law doctrine of in loco parentis.[5] Under the doctrine, a teacher stands in the place of the parent and has the right to use reasonable physical punishment to secure acceptable behavior.[6] Standing alone as an abstract concept, and unsupported by the requirements of securing and maintaining an educational environment, in loco parentis loses some of its vitality. The doctrine's loss of relevancy is particularly evident when the parents, in whose place the teacher stands, do not want their child physically punished.[7]

While the concept of in loco parentis has been almost universally rejected at the university and college level,[8] the teachers and administrators of public schools stand in some degree of in loco parentis to the students. The degree to which teachers and administrators stand in loco parentis appears directly related to the maturity of the individual student and his or her ability to function independently, conditioned somewhat by his or her parents' expectations. These factors, together with the existence of compulsory education, the nature of public school class scheduling, the financing of the schools through local property taxes, and other environmental factors peculiar to the public school setting are contributing factors to the existence of in loco parentis.[9]

A second source of authority for teachers using corporal punishment arises under specific state statutes. A state can simply recognize the common law right of a teacher to use corporal punishment under certain circumstances, as does Vermont,[10] or it can authorize corporal punishment by reference in a statute delineating how corporal punishment must be administered.[11] Other states recognize the common law right of moderate corporal punishment by allowing a teacher moderate or reasonable physical contact when used in correcting students.[12]

Many states have, or are considering adopting the Model Penal Code.[13] Section 3.08(2)(b) of the Model Penal Code provides that the use of force upon or toward the person of another is justifiable if the actor is a teacher or person otherwise entrusted with the care or supervision of a child for a special purpose. The degree of force justified is such force as would not be designed to cause or known to create substantial risk of death, serious bodily harm, disfigurement, extreme pain, mental distress, or gross degradation. The actor must believe the force is necessary to further the specific purpose of his or her relationship with the child and that the force is consistent with the welfare of the minor. The force a teacher may use is the same force as a parent or guardian can justify using, so the common law doctrine of in loco parentis is brought forward in the Model Penal Code for the 1970s.

Authority for the Use of Corporal Punishment in Texas

In 1973, the Legislature of the State of Texas rewrote the Penal Code using as its guide the Model Penal Code. The provisions adopted by the Legislature related to corporal punishment are essentially those of the Model Penal Code, but several alterations have been made. Section 9.62 of the Texas Penal Code provides the basis for allowing corporal punishment in the public schools.

> Section 9.62. Educator—Student
>
> The use of force, but not deadly force, against a person is justified:
>
> (1) if the actor is entrusted with the care, supervision, or administration of the person for a special purpose; and,
>
> (2) when and to the degree the actor reasonably believes the force is necessary to further the special purpose or to maintain discipline in a group.

"Deadly force" is defined in Section 9.01, Texas Penal Code:

> Section 9.01. Definitions
>
> In this chapter:
>
> (1) . . .
>
> (2) . . .
>
> (3) "Deadly force" means force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury.

There are no reported cases to offer guidance to the school teacher or administrator in determining how a court would apply Section 9.62 to a specific case of corporal punishment, but Section 9.62 makes some definite changes in the Texas law. As noted by the Committee which drafted the 1974 Penal Code:

> . . . Section 9.62 sets no age limit for the student because a university instructor with a class of 25-year-old graduate students may need the justification as much as the elementary school teacher with a class of 7-year-olds. Likewise, although the section caption uses the traditional label for the relationship, "Teacher—Student," the section defines the actor and the object of his force in terms of the actual relationship between them. Thus, a camp counselor, dormitory manager, study hall prefect, and baby-sitter are all included within the terms of the relationship defined by this section. This inclusiveness is probably inconsistent with present law, which appears to require a formal teacher—student relationship, *Prendergast v. Masterson*, 196 S.W. 246 (Tex. Civ. App.—Texarkana 1917, no writ) (superintendant of school system not a teacher).[14]

Teachers and administrators of Texas must, therefore, look to the

literal language of Sections 9.62 and 9.01 together with the interpretation of former Penal Code art. 1142[15] which the present sections replaced. A review of court decisions from other states should also prove helpful in establishing parameters for the administration of corporal punishment.

Court Guidelines for the Use of Reasonable Restraint or Correction

There are numerous cases from virtually all states that specify how corporal punishment is to be administered. These cases offer certain principles directing how corporal punishment can be administered. Although general principles may be drawn from a review of these cases, one must remember that the eventual outcome of each is based upon an independent set of facts, and the cases are tried before judges and juries with widely diverse value systems. Given the same facts, different juries and judges may reach opposing results.

The basic prerequisite for legal corporal punishment is that the punishment be reasonable or moderate[16] and it may not be administered maliciously or for the purpose of revenge.[17] What constitutes reasonable or moderate corporal punishment in any given case is a question of fact for either the judge or the jury.[18] Reasonableness is determined by the size, age, sex, condition, or disposition of the student under the circumstances.[19] Moderation also depends upon the type of instrument used, the part of the body struck, and the force used.[20] Generally, if the punishment becomes immoderate or is for the purpose of revenge or is maliciously done, the right of the teacher to corporally punish ends, and the student's right of self-defense begins.[21]

Many states recognize a presumption in favor of the teacher that in correcting the student the teacher did so within the bounds of his legal authority.[22] A teacher is not liable for unforeseen injuries that result from the administration of physical punishment;[23] nevertheless, if the physical injury could have been foreseen by a prudent teacher, liability can result.[24] It also appears that a reasonably prudent teacher should examine a student's health record prior to the administration of punishment to determine if there is a preexisting physical condition such as a spinal injury or hemophilia which may be further aggravated by physical punishment.[25] Permanent injuries resulting from physical restraint or correction are generally subjected to more stringent examination by the courts.[26]

As these and other cases—which are too numerous to cite—reveal, a teacher who exceeds his or her common law rights or violates the state statute in using corporal punishment subjects him or herself to possible civil and criminal liability for assault and battery. In addition, a teacher who uses corporal punishment techniques in a

manner not permitted by state law or school board policy may become subject to having his or her employment terminated for failing to comply with official directives and established school board policy.[27]

Constitutional Considerations

The constitutionality of using corporal punishment in the public schools has been considered in several federal courts since 1971. Central to all challenges is the charge that corporal punishment constitutes cruel and unusual punishment under the eighth amendment.[28] Since the cases involve a dispute between a parent and the school over the child's behavior, the rights of the parents and children vis-a-vis the school officials is a second important issue. A third consideration is whether a student is entitled to procedural due process before corporal punishment is administered.

1) **Cruel and Unusual Punishment**

The prohibition of the eighth amendment against cruel and unusual punishment is applicable to the states and their political subdivisions through the fourteenth amendment.[29] Whether the eighth amendment prohibitions apply to corporal punishment depends upon whether corporal punishment is "punishment" under the eighth amendment.

In the numerous procedural due process cases, the courts have noted that hearings before school officials are not criminal proceedings, and they do not constitutionally require the rigor of the criminal trial or juvenile delinquency proceedings.[30] In fact, the courts have held that the procedural safeguards guaranteed in criminal or juvenile delinquency proceedings are not necessary in student suspension hearings.[31] Against this backdrop and based on authority that supports the argument that the eighth amendment applies to criminal and not civil penalties, which includes corporal punishment in the public schools, the *Gonyaw v. Gray*[32] and *Ingraham v. Wright*[33] courts held the eighth amendment inapplicable to corporal punishment. In rejecting the claim, the *Ingraham v. Wright*[34] court specifically deferred the "scrutiny of the propriety of physical force used by a school teacher upon his or her students"[35] to the state courts which have particular expertise in tort and criminal law.

No court has held a state statute or board policy providing for corporal punishment to be unconstitutional per se as constituting cruel and unusual punishment.[36] However, the Seventh Circuit Court of Appeals found on review in *Nelson v. Heyne*[37] that the school official's actions fell within the eighth amendment's prohibition. Similarly, the Eighth Circuit Court of Appeals remanded a case to the district court for further development of the facts to determine if the corporal punishment was administered in an un-

constitutional manner.[38]

The courts which have indicated corporal punishment at public schools may fall within the prohibitions of the eighth amendment have not delineated specific guidelines to determine when corporal punishment constitutes cruel and unusual punishment. The record in *Nelson v. Heyne*[39] revealed that the beatings given the juvenile inmates were disproportionate to the offenses. The *Nelson* court determined that the beatings did not "measure up to contemporary standards of decency in our contemporary society."[40] It is, therefore, apparent that a determination of whether punishment is cruel and unusual will be determined on the basis of reasonableness and moderation.[41] The considerations of age, the nature of the misconduct involved, the risk of physical and psychological damage, and the availability of alternative disciplinary measures are examined in determining whether the punishment is excessive. The constitutional tests proposed by these courts are comparable to those employed for years in the interpretation of the common law and state statutes regulating corporal punishment. The significant consideration to be added by the eighth amendment, if ever determined to be applicable to corporal punishment, is the requirement that punishment not be grealty disproportionate to the offense charged.[42]

2) **A Parent's Right to Object to Physical Punishment**

The rights of parents to direct what their children are to be taught and how they are to be disciplined by public school officials have long been a heated subject of debate. Although parents have a primary role in the upbringing of their children,[43] these parental rights are not without limitation. If it appears that parental decisions will jeopardize the health or safety of the child or possibly lead to burdens on society, the parents' rights may be restricted.[44] Whenever state laws infringe upon parents' fundamental rights to direct the upbringing of their child, the state's intrusion must be justified. In doing so, the reasonableness of the state's practice must be demonstrated, and the educational and social needs established. The courts are inclined to employ a balancing test to determine the reasonableness of an intrusion, and this approach is particularly applicable when first amendment rights are also at issue.[45]

The *Ware v. Estes*[46] court rejected the right of a parent to proscribe the physical punishment of his child while at school. The Dallas School District was able to convince the court that its corporal punishment policy was reasonably necessary to attain and preserve an effective educational environment. The school in *Glaser v. Marietta*[47] was unable to persuade its court that the needs of the school to punish without parental consent are greater than the right of the parents to raise their children as they see fit. This issue may have been finally resolved by the Supreme Court's affirmance of a North Carolina three judge court's determination that the school may corporally punish a student over a parent's objection.[48]

The *Baker v. Owen*[49] court rejected the parent's contention that her right to determine and choose between means of disciplining her child was not a fundamental right nor was it absolute. The court recognized that many professional educators and parents discourage corporal punishment, but society had not yet disapproved corporal punishment as a disciplinary technique. The school has a legitimate and substantial interest in securing and maintaining discipline in the public schools, and the court refused to restrict the school official's discretion in deciding whether corporal punishment would be used in accomplishing the essential purpose of maintaining discipline. The decision whether to allow corporal punishment as a disciplinary technique is an educational question for educators and a political question for school board members.

3) **Procedural Due Process Requirements**

With *Goss v. Lopez*[50] the debate concerning a public school student's right to a hearing prior to suspension from school ended. Ohio laws, like those of Texas[51] and most states, bestow on students a protected interest in a continued education. Whenever a school official desires to deprive a student of attendance at school for misconduct, he or she must first afford the student notice and hearing appropriate to the nature of the case. For suspensions of up to ten days, required due process consists of telling the student what he or she is accused of doing together with the basis of the accusation. If the student denies the misconduct, the school official must then explain to him or her the evidence the school officials have, and give the student an opportunity to present his or her side of the story. After this informal "hearing," the school official may either suspend the student or allow him or her to remain in school.[52]

The Supreme Court recognized the special circumstances where it is necessary to remove a dangerous or disruptive student without an immediate hearing. Even though the Court avoided consideration of suspensions of more than ten days, the holding clearly indicates that more formal procedures are required if the suspension is to exceed ten days.[53]

In reaching the result, the Court held that having chosen to grant students the right to an education, Ohio may not withdraw the right, without following fundamentally fair procedures to determine whether the misconduct has occurred. Also significant to the requirement that procedural due process is necessary was the fact that charges of misconduct are sustained and if recorded "could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment."[54] This, the Court reasoned, collided with the due process clause, which forbids the arbitrary deprivation of liberty. The dissent argued that the majority "appears to sweep with the protected interest in education a multitude of discretionary decisions in the educational process."[55] Inherent in the dissent's

fears was whether notice and hearing will be required when the school attempts to discipline a child in any manner—including corporal punishment.

Prior to *Goss*, only one court required that a student be given notice and a hearing prior to the admission of corporal punishment,[56] and after *Goss*, one other court has concurred.[57] In all other cases, the courts have rejected the contention that due process is required.[58] To require notice, hearing, a written statement of the charges and a formal adversary hearing would smother the educational process in legalisms and substantially frustrate the beneficial results of speedy chastisement.[59] Procedural due process does not require a trial-type hearing in all cases involving the impairment of a private interest, and corporal punishment is not one of these interests.[60]

The issue of what procedural elements, if any, must be provided prior to the administration of the punishment will surely be further litigated. The notice and hearing requirement of *Goss* are distinguishable from corporal punishment cases in several respects. Suspension from school constitutes a "withdrawal"[61] of the state granted right to an education, while corporal punishment does not. Further, it is doubtful that records of corporal punishment will seriously damage the student's standing with his fellow students or interfere with later opportunities for higher education and employment.[62] Nevertheless, a corporal punishment is subject to abuses as the numerous state civil and criminal cases reviewed earlier reveal, in an attempt to minimize the abuse of corporal punishment, courts will be tempted to stretch constitutional principles beyond *Goss v. Lopez* to protect those students who might suffer degradation.

Liability of Teachers, Administrators, and Board Members Related to the Use of Corporal Punishment

The administration of corporal punishment is most often questioned when parents feel their child has been abused or inappropriately disciplined. An inordinately high percentage of personal damage suits against teachers and administrators involves alleged injuries suffered by students as a result of the administration of corporal punishment. An equally high percentage of criminal suits against school employees also arises out of the administration of the disciplinary action. These civil and criminal actions are controlled by the state's criminal and civil laws which have been reviewed in preceding sections.

The liability to which a school employee or board member is exposed under the various civil rights acts of the United States for the administration of corporal punishment has been of particular concern since *Wood v. Strickland*.[63] In *Wood*, a case involving the

suspension of students in Mena, Arkansas, the Supreme Court established that school employees and board members may be liable for money damages if they act maliciously or without good faith in depriving a student of a constitutional right. Liability can also be predicated upon a court finding that even in the absence of malice the school employee or board member deprived a student or employee of a "settled, indisputable law"[64] or a "clearly established constitutional right that his or her action cannot reasonably be characterized as being in good faith. . ."[65] Although the Court was careful to state that school administrators are "not charged with predicting the future course of constitutional law,"[66] school employees and board members have anguished over the application of the *Wood v. Strickland* standards on their actions.

The Courts of Appeals have recently considered several cases in which claims for monetary damages against school officials have been advanced, and several guidelines have emerged to offer guidance. The first guideline is that a court will look to all facts surrounding the complained of action to determine if it was maliciously motivated with the question of motivation being a proper one for a jury.[67]

When considering the question of whether the student or employee was deprived of a settled, indisputable constitutional right, the courts will apparently look to the state of the law at the time the action was taken.[68] What constitutes a settled constitutional right apparently depends upon whether the Supreme Court or the Court of Appeals in which the state lies has decided a similar case. Occasionally, a court may look to a definitive opinion from another circuit court, but the question is always present whether the case has settled the constitutional issue.[69] Since the facts surrounding each controversy normally dictate the result of a case, it will be difficult to establish absolute standards; and the question will probably continue to be resolved in a case-by-case basis.

In determining if and how corporal punishment is to be administered in a Texas school district, administrators and board members should look to *Ingraham v. Wright* for the constitutional standard applicable in the Fifth Circuit Court of Appeals. Unless and until the Supreme Court determines the standards to be otherwise, it appears that reliance on *Ingraham v. Wright*'s should provide insulation for administrators and board members from personal liability under the nation's civil rights acts. All actions must, however, be taken in good faith and without malice.

Issues To Consider in Formulating a Board Policy Providing for the Use of Corporal Punishment

No attempt will be made to offer a "model" corporal punishment policy because the desires of the community, the school staff, and

the board dictate the substance of the district's policy. What may be desirable in one community could be unacceptable in another. There are, however, several items which should be considered in formulating any policy.

1) Preliminary Statement

The preliminary statement may include a recitation of philosophy or other matters of concern with respect to corporal punishment. It should, however, state that corporal punishment must be administered reasonably or "moderately" and not with malice or for the purpose of revenge. The specific requirements of Section 9.62 of the Texas Penal Code might be included.

2) Definition of Corporal Punishment

A definition of corporal punishment should be included to avoid difficulties in determining if a specific punishment or treatment of students is corporal and subject to the rule. State laws generally do not define corporal punishment, nor is it defined in case law; literally, it means physical punishment or punishment to the body and probably includes any touching which would be a battery. An acceptable definition is "any type of punishment or correction administered to a pupil's body in any manner whatsoever, including, but not limited to spanking, paddling, slapping, and shaking the student." Under any definition, "swats" given in physical education classes constitute corporal punishment. If a particular type of corporal punishment is prohibited, it should be specifically listed.

3) Requirement of Parental Permission

This is presently the most controversial aspect of corporal punishment: should parents be able to designate whether their child will be corporally punished without their permission? The legal status is somewhat settled, so the policy can provide for punishment without parental permission. If a board opts for allowing parents to deny the school the right to administer corporal punishment, it appears reasonable for the school to notify the parents that in doing so they must assume a more responsible role in assuring that the child's behavior at school is acceptable. By exercising the right to direct the school's disciplining of their child, the parents assume greater responsibility for his or her discipline while at school.

Should a board determine to allow corporal punishment according to the wishes of the individual parents, it has two approaches available. The board can provide that corporal punishment may be used unless the parents send a letter to the school stating their desire that their child not be corporally punished, or the board can provide that no child will be corporally punished unless the parents send a letter to the school stating that their child may be corporally punished. Since most parents characteristically do not send either type of letter, boards desiring to keep corporal punishment as a tool of discipline choose the first approach and require that parents send a letter if they do not want their child corporally punished.

4) When To Be Administered

Teachers and principals should be guided by a statement of when and under what circumstances corporal punishment is to be administered as a matter of "last resort," which means after less stringent measures such as counseling and parental conferences have failed to produce the desired behavior modification. Often boards allow their administrators to offer the student corporal punishment as an alternative to a short suspension. School districts which receive federal funds are subject to Title IX of the 1972 Education Amendments and Department of Health, Education, and Welfare Regulations; therefore, if corporal punishment is offered as an alternative to suspension to male students, the same offer must be offered to female students.[70] Although not now required of school districts in the Fifth Circuit, the policy can outline the types of misconduct for which corporal punishment may be administered.

5) Notice and Hearing before Administration

Although the Fifth Circuit's decision in *Ingraham v. Wright* and the weight of authority is to the contrary, the courts will continue to consider whether notice and hearing plus other elements of procedural due process, are required before the administration of corporal punishment. Even in the absence of a definitive constitutional requirement, a school may provide for notice and hearing in its own policy. A reasonable approach is that required for short suspensions in *Goss v. Lopez*.[71] School officials customarily tell students what rule they have allegedly violated and the nature of their alleged misconduct before administering corporal punishment. Further, if a student denies that he or she was involved in the misconduct, a school official will generally allow the student to tell his or her side of the story and conduct a further investigation to satisfy him or herself that the student is guilty.

6) By Whom To Be Administered

The policy should specifically state who is to administer the punishment and under what circumstances. The policy may provide that the teacher can administer the punishment after obtaining the permission of the principal or a discipline committee each time it is administered, or it may provide that teachers have blanket approval to administer it generally and without approval each time.

7) Where To Be Administered

Most policies provide that corporal punishment will be administered in a specific place such as the principal's office. Other policies provide that the punishment must not be done in view of other students or within their hearing.

8) Requirement of Witness

Almost without exception, policies require that each act of corporal punishment be witnessed by the principal or another teacher. The reason for this is obvious. The witness protects the student by helping insure that the teacher administering the punishment does

so moderately, without malice and not for revenge. The witness is also available to testify that the punishment was legally administered, should the act be questioned in an administrative or court proceeding.

9) Instruments To Be Used

The policy may also specify the type of instrument to be used and set limits on such factors as width, length, and thickness. Certain instruments may be prohibited, and a limit may be set on the number of swats to be administered.

10) Report of Punishment

In an attempt to administer the policy and prevent abuses of the use of corporal punishment, some policies require each act of corporal punishment to be reported to some central administration officer, such as the superintendent. This report may require information on items such as the name of the student, the type of misbehavior, any previous disciplinary actions, the type of corporal punishment administered, the name of the person administering the punishment, the names of witnesses present, and the date and time of punishment.[72] If reports are prepared, this information must be made available to a parent who requests information concerning the corporal punishment of his or her child.[73]

Conclusion

The acceptability of corporal punishment as a disciplinary technique will continue to be an important matter for debate. There will likely be numerous actions initiated in the state's criminal justice system and comparable abundance of personal injury suits filed concerning its administration. However, with the federal constitutional standards far from being wooden absolutes, the emphasis in major litigation will probably shift to the federal courts. Until the Supreme Court of the United States definitively rules in a corporal punishment case, school administrators and board members should look to *Ingraham v. Wright* and any subsequent opinion of the Fifth Circuit Court of Appeals for a statement of a student's constitutional rights.

Although a school district is not required to utilize corporal punishment as a disciplinary tool, it may do so under the circumstances generally reviewed in this article. Within these parameters, the contents of a corporal punishment policy become questions of what is acceptable to the patrons of each local school district. Whatever a board decides to include in a corporal punishment policy should be printed and distributed to all persons concerned—including parents, teachers, and students—so that the policy is a matter of record for common reference.

[1] *Report of the Task Force on Corporal Punishment*, National Education Association [hereinafter cited as *Report*] at 29-A (1972); *Corporal Punishment in the Public Schools*, 6 HARV. CIV RIGHTS-CIV. LIB. L. REV. 858 (1971), Note, *In Loco Parentis and Due Process; Should these Doctrines Apply to Corporal Punishment?*, 26 BAY L. REV. 678 (1974).

[2] *Report*, at 26.

[3] 328 F. Supp. 657 (N.D. Tex.), *aff'd* 458 F.2d 1360 (5th Cir. 1971), *cert. denied*, 409 U.S. 1027 (1972).

[4] There are several noteworthy texts in which traditional corporal punishment is reviewed in detail. A review of those cases in this article would serve only to restate what is already available: N. EDWARDS, THE COURTS AND THE PUBLIC SCHOOLS: THE LEGAL BASIS OF SCHOOL ORGANIZATION AND ADMINISTRATION (3d ed. 1971); K. ALEXANDER, R. CORNS & W. McCANN, PUBLIC SCHOOL LAW; CASES AND MATERIALS (1969); L. J. PETERSON, R. A. ROSS-MILLER & N. M. VOLZ, THE LAW AND PUBLIC SCHOOL OPERATION (1968).

[5] W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 453 (T. Cooley ed. 1884).

[6] *Holmes v. State*, 39 So. 569, 570 (Ala. 1905); *State v. Lutz*, 113 N.E.2d 757 (Ohio 1953).

[7] The doctrine of in loco parentis is so deeply engrained in American jurisprudence that the right of teachers to punish students for behavior totally removed from the school environment has been routinely recognized. *State v. Lutz*, 113 N.E.2d 757 (Ohio 1953); *Lander v. Seaver*, 32 Vt. 114 (1859); *Balding v. State*, 23 Tex. App. 172, 4 S.W .579 (1887). These cases have given rise to the contention of school officials that they have jurisdiction of the children from the time the students leave home in the morning until they return home in the evening, and in some states this jurisdiction has been granted school authorities through statutes. *See*, PURDON'S STATS., Title 24 § 13-1317 (Pa.) and KY. REV. STATS. 161.180. This claimed authority is now being disputed by the proposition embodied in GENERAL ORDER ON JUDICIAL STANDARDS OF PROCEDURES AND SUBSTANCE IN REVIEW OF STUDENT DISCIPLINE IN SUPPORTED INSTITUTIONS OF HIGHER EDUCATION, 45 F.R.D. 133, 145 (W.D. Mo. 1968). The General Order provides that a school has jurisdiction of a student's conduct off campus only when relevant to the lawful missions, processes, or functions of the school. Also, if the school officials have unlimited jurisdiction of the students to and from school, an argument can be advanced that the school administrators also have a duty to properly supervise the students in the process.

[8] *Pratz v. Louisiana Polytech. Institute*, 316 F. Supp. 872, 876 (W.D. La. 1970), *aff'd* 401 U.S. 1004 (1972); *Moore v. Student Affairs Comm. of Troy State Univ.*, 284 F. Supp. 725, 729 (M.D. Ala. 1968).

[9] *Mailloux v. Kiley*, 436 F.2d 565 (1st Cir. 1971); *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970); *Church v. Board of Educ.*, 339 F. Supp. 538 (E.D. Mich. 1972); *Pervis v. La Marque Indep. School Dist.*, 328 F. Supp. 638 (S.D. Tex. 1971), *rev'd on other grounds*, 466 F.2d 1054 (5th Cir. 1972); *Axtell v. Lapenna*, 323 F. Supp. 1077 (W.D. Pa. 1971); *Turley v. Adel Community School Dist.*, 322 F. Supp. 402 (S.D. Iowa 1971); *Cordova v. Chonko*, 315 F. Supp. 953 (N.D. Ohio 1970).

[10] VA. STAT. ANN. 16 §1161; *Gonyaw v. Gray*, 361 F. Supp. 366 (D. Vt. 1973); CODE OF VT. 22-231.1.

[11] FLA. STAT. ANN. § 232.27.

[12] TEX. PEN. CODE, art 1142 (1970), *repealed and reenacted*, TEX. PEN. CODE § 9.62 (1973).

[13] ABA-ALI MODEL PEN. CODE, (May 24. 1962); TEX. PEN. CODE. § 9.62 (1973).

[14] PROPOSED PENAL CODE, Committee Comment, Section 9.62 (1972).

[15] TEX. PEN. CODE, art 1142 (1970), *repealed and reenacted*, TEX. PEN. CODE § 9.62 (1973).

[16] *Tinkham v. Kole*, 110 N.W.2d 258 (Iowa 1961); *Suits v. Glover*, 260 Ala. 449, 71 So.2d 49 (1954); *Hogan v. Newton*, 185 Misc. 405, 56 N.Y.S.2d 779 (1945); *Dill v. State*, 87 Tex. Crim. 49, 219 S.W. 481 (1920); *Stephens v. State*, 844 Tex. Crim. 67, 68 S.W. 281 (1902).

[17] *Suits v. Glover*, 260 Ala. 449, 71 So.2d 49 (1949); *Dill v. State*, 87 Tex. Crim. 49, 219 S.W. 481 (1920); *Lander v. Seaver*, 32 Vt. 114, 76 Am. Dec. 156 1859).

[18] *Tinkham v. Kole*, 116 N.W.2d 258 (Iowa 1961); *Andreozzi v. Rubano*, 141 A.2d 639 (Conn. 1958); *Hogan v. Newton*, 185 Misc. 405, 56 N.Y.S.2d 779 (1945); and *Harris v. State*, 83 Tex. Crim. 468, 203 S.W. 1089 (1918).

[19] *Johnson v. Horace Mann*, 241 So.2d 588 (La. 1970); *Suits v. Glover*, 260 Ala. 449, 71 So.2d 49 (1954); *People v. Newton*, 56 N.Y.S.2d 779 (1945); *Dowlen v. State*, 14 Tex. Crim, 61 (1883). The continued use of sex as a determinative factor is now questionable. Title IX of the Education Amendments of 1972, U.S.C. § 1681 *et seq.*

[20] *Johnson v. Horace Mann*, 241 So.2d 588 (La. 1970); *Suits v. Glover*, 260 Ala. 449, 71 So.2d 44 (1954); *Wilson v. State*, 80 Tex Crim. 442, 190 S.W. 155 (1916).

[21] *Dill v. State*, 87 Tex. Crim. 49, 219 S.W. 481 (1920); *Stephens v. State*, 44 Tex. Crim. 67, 68 S.W. 281 (1902).

[22] *Vanvactor v. State*, 113 Ind. 276, 15 N.W. 341 (1888); *Dowlen v. State*, 14 Tex. Crim. 61 (1883).

[23] *Tinkham v. Kole*, 110 N.W.2d 258 (Iowa 1961); *Ely v. State*, 68 Tex. Crim. 562, 152 S.W. 631 (1913).

[24] *Drum v. Miller*, 135 N.C. 204, 47 S.E. 421 (1904).

[25] *State v. Lutz*, 113 N.E.2d 757 (Ohio 1953).

[26] *Tinkham v. Kole*, 252 Iowa 130, 110 N.W.2d 258 (1961); *Suits v. Glover*, 260 Ala. 449, 71 So.2d 49 (1949).

[27] *Berry v Arnold School Dist.* 137 S.W.2d 256 (Ark. 1940).

[28] U.S. CONST. amend. VIII.

[29] *Furman v. Georgia*, 408 U.S. 238 (1972); *Cooper v. Aaron*, 358 U.S. 1 (1958).

[30] *Linwood v. Board of Educ.*, 463 F.2d 763 770 (7th Cir. 1972); *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1089-90 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970); *Baker v. Hardway*, 399 F.2d 638 (4th Cir.), *cert. denied*, 394 U.S. 905 (1969); *Madera v. Board of Educ.*, 386 F.2d 778, 780 (2d Cir. 1967); *cert. denied*, 390 U.S. 1028 (1968).

[31] *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 158-59 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

[32] 361 F. Supp 366 (D. Vt. 1973); *See also, Sims v. Waln*, 388 F. Supp. 543 (S.D. Ohio 1974) and *Sims v. Board of Educ.*, 329 F. Supp. 678 (D.N.M. 1971). The *Sims v. Board of Educ.* court recognized the argument but declined to base its decision on it.

[33] _____ F.2d _____ (5th Cir., En Banc, No. 73-2078; January 8, 1976).

[34] *Id.*

[35] *Id*, at p. 1096 Slip Opinion.

[36] *Baker v. Owen*, 395 F. Supp. 294 (M.D.N.C., Three Judge Court), *aff'd*, _____ U.S. _____, 96 S. Ct. 210 (1975) *Mahanes v. Hall* _____ F. Supp. _____, (E.D. Va., Civ. No. 304-73-R, 1974); *Glaser v. Marietta*, 351 F. Supp. 555 (W.D. Pa. 1972); *Ware v. Estes*. 328 F. Supp. 657 (N.D. Tex.), *aff'd*, 458 F.2d 1360 (5th Cir. 1971), *cert. denied*, 409 U.S. 1027 (1972); *Whatley v. Pike Cty. Bd. of Educ.*, (N.D. Ga., Civ. No. 977, Three Judge Court, 1971).

[37] 491 F.2d 352 (7th Cir. 1974).
[38] *Bramlet v. Wilson*, 495 F.2d 714 (8th Cir. 1974).
[39] 491 F.2d 352 (7th Cir. 1974).
[40] *Id.*, at 356.
[41] 498 F.2d at 264-65.
[42] *Id.*, at 264.
[43] *Meyer v. Nebraska*, 262 U.S. 390 (1922).
[4] *Prince v .Commonwealth of Massachusetts*, 321 U.S. 159 (1943). *See also, Cornwell v. State Bd. of Educ.*, 314 F. Supp. 340 (D. Md.), *aff'd* 428 F.2d 471 (7th Cir. 1969), *cert. denied*, 400 U.S. 942 (1970); *Mercer v. Michigan State Bd. of Educ.*, 379 F. Supp. 580 (E.D. Mich. 1974); *Meek v. Pittinger*, 374 F. Supp. 639 (E.D. Pa. 1974).
[45] *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
[46] 328 F. Supp. 657 (N.D. Tex.), *aff'd* 458 F.2d 1360 (5th Cir. 1971), *cert. denied*, 409 U.S. 1027 (1972).
[47] 351 F. Supp. 555 (W.D. Pa. 1972).
[48] *Baker v. Owen*, 395 F. Supp. 294 (M.D.N.C., Three Judge Court), *aff'd*, ____ U.S. ____, 96 S. Ct. 210 (1975) [affirmance on the appeal of parental rights].
[49] *Id.*, at pp. 299-301.
[50] 419 U.S. 565, 95 S. Ct. 729 (1975).
[51] TEX. ED. CODE § 21.031 (Supp. 1976).
[52] 419 U.S. 565, ____, 95 S. Ct. 729, 740.
[53] Id., at p. 741. *See also, Williams v. Dade Cty. School Bd.*, 441 F.2d 229, 302 (5th Cir. 1971); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir.), 1971); *Dixon v. Alabama State Bd. of Educ.*, BTD F.Bd VE0, VET (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).
[54] *Goss v. Lopez*, 419 U.S. 565, ____, 95 S. Ct. 729, 736 (1975).
[55] *Id.*
[56] *Mahanes v. Hall*, ____ F. Supp. ____ (E.D. Va., Civ. No. 304-73-R, 1974).
[57] *Baker v. Owen*, 395 F. Supp. 294 (M.D.N.C., Three Judge Court), *aff'd*, ____ U.S. ____, 96 S. Ct. 210 (1975) [affirmance on the appeal of parental rights].
[58] *Ingraham v. Wright*, ____ F.2d ____ (5th Cir., En Banc, No. 73-2078, January 8, 1976). *Gonyaw v. Gray*, 361 F. Supp. 366 (D. Vt. 1973); *Glaser v. Marietta*, 351 F. Supp. 555 (W.D. Pa. 1972); *Sims v. Board of Educ.*, 329 F. Supp. 678 (D.N.M. 1971).
[59] *Glaser v. Marietta*, 351 F. Supp. 555, 559 (W.D. Pa. 1972). This argument, as it related to student suspensions, was rejected in *Goss v. Lopez*.
[60] *Ingraham v. Wright*, ____ F.2d ____ (5th Cir., En Banc, No. 73-2078, January 8, 1976); *Sims v. Board of Educ.*, 329 F. Supp. 678, 684 (D.N.M. 1971)
[61] *Goss v .Lopez*, 419 U.S. 565, ____, 95 S. Ct. 729, 736 (1975); *Ingraham v. Wright*, ____ F.2d ____ (5th Cir., En Banc, No. 73-2078, January 8, 1976) at page 1101 Slip Opinion.
[62] *Id.*, 419 U.S. 565, ____, 95 S. Ct. 792, 736 and No. 73-2078 at page 1100 Slip Opinion.
[63] ____ U.S. ____, 95 S. Ct. 992 (1975).
[64] *Id.*, at p. 1000.
[65] *Id.*, at p. 1001.
[66] *Id.*, at p. 1000.
[67] *O'Connor v. Donaldson*, ____ U.S. ____, 95 S. Ct. 2486 (1975).
[68] *Sapp v. Renfroe*, 511 F.2d 172 (5th Cir. 1975).
[69] *Id.*
[70] Title IX of the 1972 Education Amendments, 20 U.S.C. § 1681 *et seq*; Rules and Regulations of the Department of Health, Education and Welfare,

45 C.F.R. Part 86 (July 21, 1975).

[71] 419 U.S. 565, 95 S. Ct. 729 (1975).

[72] New Department of Health, Education and Welfare Regulations will apparently require 3,000 school districts throughout the United States to keep records on student discipline, including corporal punishment, by race, sex and national origin. *Houston Chronicle* (January 19, 1976); 9 *Education Daily* No. 9 (January 14, 1976). *See also*: *Baker v. Owen*, 395 F. Supp. 294 (M.D.N.C., Three Judge Court). *aff'd*, ____ U.S. ____, 96 S. Ct. 210 (1975) [affirmance on the appeal of parental rights].

[73] The Family Education Rights and Privacy Act of 1974 and the Texas Open Records Act, TEX. REV. CIV. STAT. ANN. art. 6252-17a (Supp. 1975) require that student records be made available to parents but prohibit their release in a form which will personally identify a fellow student.

ELLEN ANDERSON

Exclusivity v. Individual Rights?

Although the rights of association and free speech are guaranteed, the right for employees to "consult" with employers is not guaranteed under the first or fourteenth amendments to the United States Constitution.[1] Nor is the private sector model of exclusivity a prescribed right of the public employee organization representing the majority.

Texas school districts over the last ten years have steadily faced increasing demands from staff organizations for benefits and services. Policy and procedures for handling such requests have developed in a permissive atmosphere without formal, statutory guidelines. This trend is not unique to Texas:

> If the decade of the sixties accomplished nothing else, it buried permanently the myth that teachers are self-sacrificing missionaries content to work for whatever wages and under whatever working conditions the patrons in a local community thought appropriate for such service-minded folk.[2]

Consequently, the 63rd Texas Legislature passed a permissive meet and confer statute in an effort to placate the emerging, self-actualized teacher organizations. Section 13.901, Texas Education Code, pertaining to professional consultation, states that the board of trustees of each independent school district:

> may consult with teachers with respect to matters of educational policy and conditions of employment; and such boards of trustees may adopt and make reasonable rules, regulations, and agreements to provide for such consultation. This section shall not limit or affect the power of said trustees to manage and govern said schools.[3]

The vagueness of the legislature's intent has generated much

controversy over the question of how teachers or other employees will be represented in consultation, and what privileges will be afforded. Perhaps the most apparent controversy involves the issue of exclusivity: one employee organization is recognized by the school board to represent the entire group of employees for the purpose of consultation. This conflict is evidenced in the rivalry between National Education Association (NEA) local affiliates and American Federation of Teachers, AFL-CIO, local affiliates in Texas.

The NEA and the more vocal AFT are the two rivaling national teacher organizations. The court has recently sanctioned the merger of the Texas State Teachers Association (TSTA) with the NEA. Simultaneously, the AFT is waging individual battles against TSTA/NEA locals in Texas to win rights and privileges for its membership. The rivalry is gaining momentum through litigation.[4]

An analysis of the NEA-AFT conflict in Texas is specifically linked to the dominance of the anti-union, anti-collective bargaining statute, Article 5154c[5], and the preponderance of de facto collective activity which is operating without legal sanction.

Some school board members and school administrators who are involved in "consultation" can see little if any difference in the process and that of collective bargaining. Consequently, as de facto collective negotiations are in operation in Texas without legal guidelines, school boards, as governing, managerial bodies are faced with a dilemma. They must determine policies consistent with the operation of their districts. Regarding collective activity, the concept of an exclusive representative organization, and the rights and privileges thereof, i.e. dues checkoff, use of school mail, officer leave, etc., has been the major issue in the NEA/AFT verbal battle.

Exclusivity, and the rights accompanying it, is the focus of this section. Two viewpoints automatically line up on opposite sides of the field. The question is not who will get the toss, but whether school boards have the authority to grant exclusivity to a single teacher organization for the purpose of consultation as provided in §13.901, Texas Education Code.

> Supporters of exclusive representation procedures claim that under existing law and legal principles (absence of specific legislation to the contrary and not in terms of private employment) the school board may choose to confer with some group, no groups at all, or they may confer with minority groups if they so desire.[6]

Further, while only a few laws require a school board to grant exclusivity, "seldom does a law prohibit a district from doing so. . . . Six of the state negotiations statutes covering teachers now in force provide for a majority of the employees to elect a representative."[7]

Conversely, opponents of exclusivity policies voice the opinion

that in the absence of state laws on the subject

> many school boards take the view that they are legally prohibited from recognizing an exclusive representative, engaging in negotiations, or signing a collective agreement.[8]

Regardless of whether one is persuaded that unequal treatment from the private sector is essential or whether one believes that the "nature of public employment is merely a ruse to give public employees 'lesser rights,' all must realize that a public employer is a creature of law and acts through law. Therefore, the 'rights' of public employees are apt to be tested by means of a constitutional standard."[9]

Therefore, the discussion of exclusive recognition and the rights and privileges of such, will include an analysis of prevailing Texas law, Constitutional law, and pertinent court decisions.

Argument for an Exclusivity Policy in Texas Schools

Neither Article 5154c nor §13.901, *supra*, Texas Education Code, prohibits the school board from recognizing an exclusive agent to represent employees in consultation. Moreover, §23.25 and §23.26,[10] Texas Education Code, delegate the responsibility of operating the public schools to the local boards. Specifically, Section 23.26(b) states: "The trustees shall have the exclusive power to manage and govern the free schools of the district";[11] Section 23.26(d) allows that "the trustees may adopt such rules, regulations, and by laws as they deem proper."[12]

Therefore, supporters of exclusive recognition interpret Section 23.26(d) to authorize school boards to adopt policies recognizing an exclusive representative. The argument is that the selection of an exclusive group is mandated under the general welfare statement to "conduct and maintain orderly schools in any legal manner, (which) does not contravene an existing statute."[13]

In the private sector, the National Labor Relations Act of 1935, commonly referred to as the Wagner Act, established the machinery for selection of an exclusive bargaining agent.

> It set forth the principle of majority rule for the selection of employee bargaining representatives and provided that, should the employees express doubt as to the union's majority status, a secret ballot election of the employees would determine if the majority existed.[14]

Both NEA and AFT support the private sector model; and through resolution have adopted exclusivity as a policy goal. The assembly at the AFT convention in 1964 resolved that "each local AFT . . . seek exclusive collective bargaining rights through democratic election involving all classroom teachers as the most effective means of representation for teachers."[15]

Similarly, NEA at its 1965 convention determined that as the desired result of the negotiation process is agreement, only one organization can participate in negotiations which lead to agreement.[16]

> It is a fundamental principle of professonial negotiations that the teacher organization which has the majority support should have exclusive negotiations rights . . . only one organization can negotiate effectively for the professional staff.[17]

School boards in Texas are bound by Section 13.217,[18] Texas Education Code, which provides that teachers have the right to join or not to join professional associations or organizations. Section 21.904(a)[19] protects this right of association:

> No school district, board of education, superintendent, assistant superintendent, principal, or other administrator benefiting by the funds provided for in this code, shall directly or indirectly require or coerce any teacher to join any group, club, committee, organization, or association.[20]

According to recent research, the question of whether exclusive representation benefits to one organization effectively coerces non minority organization members to join a competing organization depends upon each situation. "Absent an evidentiary showing that exclusive representation coerced a teacher to join an organization, there does not appear to be a violation of §21.904."[21]

The doctrine of "unconstitutional conditions"[22] has been couched in terms of prohibiting the conditioning of the "enjoyment of a government-connected interest . . . upon a rule requiring that one abstain from the exercise of some right protected by an express clause in the Constitution."[23] In *Frost Truck Company v. Railroad Committee of California*,[24] the Supreme Court held that

> It would be a palatable incongruity to strike down an act of state legislation, which, by words of expressed divestment, seeks to strip a citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. . . . If the state may compel the surrender of one constitutional right as a condition of its favor, it may compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.[25]

Accordingly, the application of "unconstitutional conditions" is evidenced in public education cases involving freedom of speech and freedom of association. Specifically in *Tinker v. Des Moines Independent School District*,[26] the Court concluded: "It can hardly be argued that either students or teachers shed their constitutional

rights to freedom of speech or expression at the schoolhouse gate."[27]

Also, teachers are not denied the fundamental freedom of speech outside the classroom. *Pickering v. Board of Education*[28] evidences a teacher's right of expression. In *Pickering*, a teacher was dismissed on grounds that the publication of a letter to the editor criticizing the school board was detrimental to the efficient operation of the school. On an appeal, the Supreme Court concluded that, although some of the information was inaccurate, the teacher's first amendment right had been abridged. Further, the Court states:

> To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the first amendment rights they would otherwise enjoy as citizens to comment on matters of public interest . . . it proceeds on a premise that has been unequivocably rejected in numerous prior decisions of this Court (citations omitted). The theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how reasonably, has been uniformly rejected (citations omitted).[29]

Litigation concerning the rights of a teacher to form, join, and participate in organizations of their own choosing, has overwhelmingly protected the teachers' first amendment right of association. *Keyishian v. Board of Regents*[30] is the leading case in support of the proposition. The Court held that the doctrine of "guilty by association" is a constitutionally impermissible standard to be applied. "Actions rather than membership, or evidence indicative of unlawful intent would be the only basis for disciplining a teacher because of his organizational association."[31]

Through court opinion, it is now well established that public employees and teachers possess a constitutionally protected right under the first amendment to associate with others in a labor organization whose purpose is to attempt to negotiate terms and conditions of employment with their employer. In *McLaughlin v. Tilendis*,[32] the Court pointed out that

> if teachers can engage in scathing and partially inaccurate public criticisms of their school board, surely they can form and take part in associations to further what they consider to be their well-being.[33]

Of the 412 strikes by public employees that occurred in 1970, 59 concerned union organization and security.[34] This statistic parallels the private sector experience prior to *National Labor Relations Board v. Jones and Laughlin Steel Corporation*[35] in 1937. The court sanctioned the authority to grant exclusivity in the private sector.

Local 858 of the American Federation of Teachers v. School District No. 1 of Denver,[36] applied the doctrine in *NLRB v. Jones and Laughlin*,[37] *supra*, without question. Similarly a case involving the *Federation of Delaware Teachers v. De La Warr Board of Educa-*

tion[38] upheld the private sector model. One organization was recognized as the exclusive agent for district employees, with contractual rights to use school buildings,[39] interschool mail facilities, and bulletin boards. The other group claimed denial of free speech and equal protection. The Court concluded: exclusivity is a matter of labor relations and not free speech; and accepted the exclusive rights granted the first group as "permissible to prevent school facilities from becoming a 'labor battlefield' for contending teacher organizations."[40]

Perhaps the most influential court decision rendered regarding the authority of Texas school districts to grant exclusivity is *Local 3158, Edgewood AFT v. Edgewood Independent School District*.[41] In *Edgewood*, the AFT in its petition declared that the Edgewood School District had denied the minority organization equal privileges by granting the classroom teachers' association exclusive representation rights. The AFT complained that the exclusive recognition policy of the board was an unlawful infringement of their members' right to free speech and association.

According to the court opinion, the plaintiff's cause of action, based on a violation of the first amendment, was moot. A pretrial conference determined that much of the conduct and policy had been remedied; that is, the minority group was afforded use of the school mail system and the right to present grievances for their members. Therefore, the remaining issue for the court to determine was whether the denial of dues checkoff, a consultation agreement, and leave of absence for officers to attend AFT conventions was a denial of the equal protection clause of the fourteenth amendment.

Principles governing the application of equal protection clause include a minimum rationality test and an evaluation of the extent to which the action serves the interest of the state. In *Reed v. Reed*,[42] the court stated that "the equal protection clause does not deny the states the power to treat different classes of persons in different ways (citations omitted)."[43] Further, "the equal protection clause does, however, permit states to legislate different treatments for classes of persons."[44] In explanation, the court concluded:

> A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.[45]

As in most equal protection cases, the plaintiff must prove there is appropriate governmental interest furthered in treating the members of the exclusive organization differently from others.[46] The court in *Edgewood* stated:

> It is difficult to conceive of any circumstances under which the privileges sought by the plaintiffs might be considered fundamental human rights to be equated with those involved in *Griswold* and *Shapiro*.[47] The only rights

> ever involved in this action which could be considered within the ambit of constitutional guarantees, namely the right to associate, speak out, and organize as members of the Federation, have been freely granted. . . .[48]

Consequently, the court ruled in favor of the exclusivity policy of the Edgewood School District. According to the opinion, "there is no logical reason why this principle of exclusivity cannot be constitutionally extended to cover public employees."[49] The court further declared:

> . . . the board should only have to deal with one such organization representing a majority of the teachers within the district. The school system might otherwise become scenes of glorious confrontations by two or more labor organizations . . . which might very well compete for members by outdoing the other in demands on the school administration *at the expense of the educational process* (original emphasis).[50]

Thus in *Edgewood*, dues checkoff, consultation, and time off for officers were declared privileges, not rights, as guaranteed under the first or fourteenth amendments.

Similarly, the Texas Supreme Court refused to force the State Commissioner of Education, Marlin Brockette, to hear a San Antonio teachers union appeal for equal treatment with the TSTA local affiliate.[51] Among the privileges sought were the right to distribute materials on school grounds; use of school-faculty mail systems; use of bulletin board space; and to solicit members and speak at meetings on school property. All listed privileges had been granted the exclusive teacher representative organization. The court said it would not consider the North East Federation of Teachers request for a writ of mandamus compelling the Commissioner to hear the appeal.

North East school attorneys held it was illegal to recognize a teacher union; and therefore, the school board granted exclusive recognition to the TSTA local for consultation on working conditions.

Another lawsuit involving recognition, which was filed by the Fort Worth AFT local,[52] has been dismissed. The AFT local charged that the Fort Worth school board had discriminated against members of the minority organization by granting exclusive recognition to the classroom teacher association, and by entering into an agreement which the AFT claimed was collective bargaining oriented.

In an effort to reverse the *Edgewood*[53] opinion, "the San Antonio Federation of Teacher's lawsuit is headed for federal court,"[54] according to a petition filed with the U.S. District Clerk. The suit charges that the San Antonio school district has granted exclusivity rights to a labor organization, the San Antonio Council of Teachers,

NEA local affiliate; and that school officials have "conspired to deny the Federation professional consultation rights."[55] The Federation contends that because of constitutional issues raised, the suit comes under federal court jurisdiction.

In summary, the authority of a school board to negotiate a contract and provide for an exclusive agent is very clear when statutory authority exists. In 1951, in *Norwalk Teachers Association v. Board of Education City of Norwalk*,[56] the court upheld the right or discretion of the school board to enter an agreement with exclusivity stipulated without statutory authority.

In Texas, in absence of statutory authority, the argument supporting exclusive recognition policy revolves on the following: 1) exclusive recognition involves a fixed responsibility—the teachers' exclusive representative is responsible to the organization it represents; the board is responsible to an organization which represents the majority of teachers employed; 2) consulting with a single representative is democratic; and 3) multiple representation encourages school boards to avoid agreement with any organization by using interorganizational antagonism to its advantage.[57]

An Argument Against Exclusivity Policies in Texas

Schools boards are a creation of the state legislature, which has the ultimate authority for control and operation of public schools in Texas. Local lay boards do not have inherent powers; they have power delegated by the legislature. The major source for guidelines in operating public schools is the Texas Education Code. The Code is silent on the issue of exclusive representation or recognition. Although informal recognition is a common practice, in absence of specific state legislation, the right to demand exclusive recognition and negotiation does not exist.[58] Article 5154c prohibits a board from entering into a binding contract with a labor organization. Simultaneously, a school board is precluded from "delegating its final policymaking power to subcommittees or to its employees."[59] Finally, the board is charged with conducting its business in a manner which is not "arbitrary, capricious, or whimsical."[60]

In *Alaniz v. City of San Antonio*,[61] the court upheld the constitutionality of Article 5154c. The litigation compared the public with the private sector labor relations procedures. The court concluded that "the public employer is not compelled to bargain unless required by state law to do so."[62] As 5154c specifically prohibits public sector collective bargaining in Texas, the court claimed:

> Whatever the wisest course for the State of Texas to follow in its labor relations with its employees, its choice of public policy against recognition of a labor organization as a bargaining representative for any group of employees and against collective bargaining contracts is not barred by the U.S. Constitution.[63]

Similarly in *Indianapolis Education Association v. Lewallen*,[64] the court ruled that "there is no constitutional duty to bargain collectively with an exclusive bargaining agent. Such duty, when imposed, is imposed by statute."[65]

Although Texas Education Code provision §21.904[66] protects the individual teacher's right to associate freely, it also carries a "hands off" mandate to the school district officials. The language expressly forbids a school official from "directly or indirectly" requiring or coercing teachers to join or not join any group. A common disregard of this statement is evidenced by the encouragement of some school administrators to secure 100% membership in the state teacher organization. In a few districts this tendency has been so pronounced that membership becomes an unspoken condition of employment. Recently, due to the affiliation of TSTA with NEA, this practice is waning.[67]

The language "directly or indirectly" may be interpreted to prohibit endorsement of an organization by consenting to such activities as membership recruiting during school hours, time off for organization meetings and conventions, use of school communication systems for organization business, or free use of school facilities for organization activities. Generally, these provisions are granted to the exclusive representative.

Consequently, absent a constitutional right to consult with school boards, members of an organization who are denied access to consultation or other privileges must establish that their right to associate or right to free speech has been violated. A school board does not have the authority to deny an employee any privileges gained under the first amendment. "There is indeed a legal propriety involved when school boards refuse to discuss or act."[68]

When a district declares one organization as the exclusive representative of the teachers as a whole, and affords that group use of teacher mail boxes, bulletin boards, and school facilities for organization business, "there is prior restraint on the exercise of these rights by members of other organizations."[69] Further,

> these activities are speech-related and any attempt to place restrictions on the content of speech or prohibit one from speaking is difficult to justify.[70]

In *Pickering*,[71] *supra*, the Court ruled that a teacher's right to publicly criticize his school board is protected by the free speech clause of the first amendment. However, in a footnote of *Pickering*, the Court indicated that it might not have reached the same conclusion if the public criticism of a superior would have seriously undermined the effectiveness of the working relationship between employer/employee. In *Fisher v. Walker*,[72] the court upheld the suspension of a local union president who voiced his opinion criticizing management through a mimeographed letter to all employees. The

court found that the action caused sufficient disruption to the employee/employer relationship. Consequently, there are some restrictions which may be placed on the rights of public employees in the application of the first amendment.

In the argument supporting exclusivity policies, *Local 858, AFT v. School District No. 1 County of Denver*,[73] *supra*, and *Federation of Delaware Teachers v. De La Warr Board of Education*,[74] *supra*, are cited as cases upholding the doctrine of exclusive recognition as modeled after the private sector procedure. It should be noted that Delaware has a collective bargaining statute; whereas, Colorado does not. In a subsequent decision in a non collective bargaining state, *Jefferson County AFT v. Jefferson County Board of Education*,[75] the court denied the school board the right to offer exclusivity.

Also, the U.S. District Court for the Middle District of North Carolina ruled in *Winston-Salem/Forsyth County Unit of the North Carolina Association of Educators v. State of North Carolina*[76] that the North Carolina General Statute 95-98, which prohibits contracts (specifying exclusivity) between state governmental units and public employee labor organizations, is valid and constitutional. Further, in *Hanover Federation of Teachers v. Hanover Community School Corporation*,[77] the court concluded: "while the first amendment may protect the right of plaintiffs to associate and advocate, not all their associational activities have the protection of that amendment."[78]

In *Houston Federation of Teachers, the Houston Congress of Teachers, et al., and the Houston Teacher Association v. Houston Independent School District*,[79] then Commissioner of Education, J. W. Edgar, denied the school board the authority to grant exclusive recognition to any teacher organization. Basing his opinion on the lack of statutory authority, the Commissioner stated:

> I am convinced that the Houston teacher consultation actions, taken as a whole, exceeded the intent and extent of the authority given to the board by the legislature to provide for consultation.[80]

Edgar cited §23.25 and 23.26, Texas Education Code, as statutes which bind the board to adopt policies which are reasonable and are applied uniformly and equitably to all employees. His opinion concluded that:

> The statutes are silent on the authority of a board to grant exclusivity. In looking at the issue from an administrative point of view, I believe that anything as influential to the consultation process as exclusivity . . . should carry the specific authorization of the legislature.[81]

Moreover, it is the "prevailing majority view that without law to authorize exclusive representation, it is illegal for a public employer

to grant such status to an employee organization. . . ."[82] The foremost concern being for the individual who may be discriminated against for being a member of the minority organization or not being a member of any organization; and thus the organizational rivalry which might occur in trying to persuade non organization or minority organization members to secure the majority organization's position.

Conclusion

Education is increasingly governed by law; the basic concepts of the law are specific. It is a reasonable corollary that the policies designed to guide operation of the schools be simply stated and specific. According to *Edgewood*,[83] *supra*, exclusively is a desired policy. However, it must be ascertained beyond any doubt that such an organization can and does speak for the majority of the staff. A question of numbers presents itself: does majority mean a majority of all teachers or all teachers voting?

Moreover, the conclusion drawn by this research is that exclusivity policies must be determined by each individual school district in relation to its current and projected labor relations. Exclusivity challenges the board and administration to develop channels of communication that will encourage the individual to participate in decision making. The right of exclusive representation does infringe on the rights of the individual as seen in the following situations.

"Under exclusive recognition, a single organization represents the entire professional staff . . . whose conditions of employment are to be covered by the negotiations."[84] Specifically, under these circumstances an employer cannot negotiate conditions of employment with an individual or members of a minority group. Additionally, an employer cannot be party to a second agreement involving another organization "without discriminating in its treatment of its personnel on the basis of membership in a particular organization."[85]

In 1969, the Wisconsin Supreme Court held that a school board may deny the representative of a minority teachers union the right to be heard at a public school board meeting on matters subject to collective bargaining.[86] Wisconsin school boards are permitted by statute to select an exclusive representative and participate in collective bargaining.

In *City of Madison Joint School District No. 8 v. WERC*,[87] the question was whether the school board had committed a prohibited labor practice, under Wisconsin law, by negotiating with other than the exclusive representative when it allowed a spokesman for the minority organization to discuss issues in the collective bargaining agreement at a public board meeting. The Madison board conceded that bargaining with a minority group of employees is prohibited, but agreed that to prevent an employee from providing information to his employer orally would "impermissibly restrict the constitu-

tional rights of public employees to speak and petition their government."[88] The court applied a balancing test and concluded that the public interest in stable labor relations and the necessity of avoiding the dangers "attendant upon relative chaos in labor management relations, outweighed the gravity of infringing these rights."[89]

Therefore, according to the 4-3 court decision, speech in the form of bargaining relative to working conditions is constitutionally restricted to representatives of the majority bargaining unit.

The dissenters cited three constitutional infirmities in the action of WERC. First, the duties and rights of the Wisconsin statute are limited by the federal and state constitutions. Therefore, if a conflict arises, it is the statute, not the constitutional right, which must yield. Second, the minority opinion concluded that exclusivity does not include the right of the designated representative to speak at a public forum to the exclusion of all other teacher voices. Third, the dissenters agreed that there was no evidence warranting threat of chaos that would warrant denying teachers their rights as citizens.[90]

Similarly, the decision of the Assistant Secretary of Labor in A/SLMR No. 301 (1973) speaks to the exclusive recognition dispute. Upon the advice of then President Nixon, the Veteran's Hospital in Muskogee, Oklahoma, established a youth advisory committee for its employees to observe and comment at management/staff meetings dealing with safety, fire protection, employee training, personnel transfer, and employee leave benefits, only to find out that the hospital had committed an unfair labor practice by dealing with other than the exclusive employee representative.

These two decisions challenge the public management to devise mechanisms to bring "other" viewpoints into the discussion, without violating the traditional employer/employee relationship as established by the doctrine of exclusive recognition.

Theoretically, exclusive recognition clauses provide stability within the teaching ranks. However, examples can be cited where the issue of exclusivity has encouraged rivalry among organizations within a district:

- Milwaukee Teachers Association, the exclusive representative, petitioned the Wisconsin Employee Relations Board to deny the Milwaukee Teachers Union (MTU) the right to dues checkoff and to prohibit the MTU from representing teachers when they have grievances.[91]
- United Federation of Teachers, New York City, negotiated a provision which prevents an officer from another teacher organization from representing a teacher who has a grievance.[92]

When minority organizations are denied the right to present grievances for their members, the individual's rights of redress may be denied also by the exclusive representative. Although the exclusive agent is required to represent equally, fairly, and impartially,

all employees whether they are members or not, "an organization need not process a grievance which it believes to be without merit."[93]

Thus the question of equality of treatment of members and nonmembers becomes an issue. After exclusivity is won by a teacher organization, it logically follows that requests for a union or agency shop will ensue to strengthen the exclusive representative's position.[94]

John Ryor, NEA president, in a letter to the president of the Spring Branch Education Association,[95] specifically listed collective bargaining and agency shop provisions as goals of NEA. As the AFT grows in size and wins exclusive recognition rights "their present position on teachers' rights to join organizations will become less tenable."[96]

Whether Texas school boards have the implied authority to adopt exclusive recognition clauses in their consultation agreements is debatable and must be decided individually. In some instances, the operation of the school may be more efficient by dealing with one group. Simultaneously, those districts recognizing exclusivity are challenged not to deny any employee their constitutional rights as citizens.

For under current Texas law, the right to demand recognition and negotiation does not exist.[97] More prevailing is the concern that the fundamental rights of individuals are not abridged or denied by the collective process.

SAMPLE PROFESSIONAL CONSULTATION POLICY

BE IT RESOLVED THAT the _____ School District adopt the following consultation agreement:

a. Consultation privileges shall be offered all employees consistent with procedures developed and implemented by the superintendent.

b. The definition of consultation shall be: advice, counsel, and the exchange of information.

c. The process for consultation shall be ongoing throughout the school year and will be as broad based as administratively feasible. The superintendent is directed to develop and implement such procedures as necessary provided that they are designed on standard school practices.

d. The superintendent shall keep the board advised of the progress and effectiveness of the district's consultation agreement procedures as well as opinion of counsel concerning the consistency with the spirit and intent of the Commissioner's decision. (J. W. Edgar, 1974).

[1] ***Alaniz v. City of San Antonio***, 80 L.R.R.M. 2983 (W.D. Tex. three-judge court, 1971).

[2] D. Myers, *Professionalization and Collective Bargaining*, 1 (1973).

[3] Sec. 13.901 Texas Education Code (1973): The board of trustees of each independent school district, rural high school district, and common school district, and their administrative personnel, may consult with teachers with respect to matters of educational policy and conditions of employment; and such boards of trustees may adopt and make reasonable rules, regulations, and agreements to provide for such consultation. This section shall not limit or affect the power of said trustees to manage and govern said schools.

[4] ***Fort Worth AFT v. Fort Worth Classroom Teachers Association and the Board of Trustees, Fort Worth Independent School District.*** Suit withdrawn by AFT. U.S. District Judge Eldon Mahon settled with redraft of grievance procedure. (Fort Worth Star-Telegram, Jan 9, 1976)

[5] Art. 5154c, Tex. Rev. Civ. Stat. (1971).

Section 1. It is declared to be against the public policy of the State of Texas for any official or group of officials of the State, or of a County, City, Municipality or other political subdivision of the State, to enter into a collective bargaining contract with a labor organization respecting the wages, hours, or conditions of employment of public employees, and any such contracts entered into after the effective date of this Act shall be null and void.

Section 2. It is declared to be against the public policy of the State of Texas for any such official or group of officials to recognize a labor organization as the bargaining agent for any group of public employees.

Section 3. It is declared to be against the public policy of the State of Texas for public employees to engage in strikes or organized work stoppages against the State of Texas or any political subdivision thereof. Any such employee who participates in such a strike shall forfeit all civil service rights, re-employment rights and any other rights, benefits, or privileges which he enjoys as a result of his employment or prior employment, providing, however, that the right of an individual to cease work shall not be abridged so long as the individual is not acting in concert with others in an organized work stoppage.

Section 4. It is declared to be the public policy of the State of Texas that no person shall be denied public employment by reason of membership or nonmembership in a labor organization.

Section 5. The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with one or more employees concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Section 6. The provisions of this Act shall not impair the existing right of public employees to present grievances concerning their wages, hours of work, or conditions of work individually or through a representative that does not claim the right of strike.

[6] R. Andree, *Collective Negotiations: A Guide to School Board Teacher Relations* [hereinafter cited as Andree], 128 (1970).

[7] E. Shils and C. T. Whittier, *Texas Teachers, Administrators, and Collective Bargaining*, 212 (1968).

[8] M. Lieberman and M. Moskow, *Collective Negotiations for Teachers* [hereinafter cited as Lieberman and Moskow], 117 (1966).

[9] A. Anderson and H. Jascourt, *Public Sector Labor Relations*, Council of State Governments and the Int'l. Personnel Management Assn. 1 (1973).

[10] Sec. 23.25 and 23.26 Tex. Ed. Code (1973):

Specifically provide:

23.25 Powers and Duties

The board of trustees of an independent school district shall have the powers and duties described in this subchapter, in addition to any other powers and duties granted or imposed by this code or by law.

23.26 In General

(a) The trustees shall constitute a body corporate and in the name of the school district may acquire and hold real and personal property, sue and be sued, and receive bequests and donations or other monies or funds coming legally into their hands.

(b) The trustees shall have the exclusive power to manage and govern the public free schools of the district.

(c) All rights and titles to the school property of the district, whether real or personal, shall be vested in the trustees and their successors in office.

(d) The trustees may adopt such rules, regulations, and by-laws as they may deem proper.

[11] *Id.*, Sec. 23.26 (b).

[12] *Id.*, Sec. 23.26 (d).

[13] Andree, 63.

[14] A. Sloane and F. Witney, *Labor Relations*, 95 (1972).

[15] Lieberman and Moskow, 113.

[16] 1965 rev. ed. NEA Guidelines for Professional Negotiations, 12.

[17] Lieberman and Moskow, 110.

[18] Sec. 13.217 Tex. Ed. Code:

Right to Join or Not to Join Professional Association

Nothing in this subchapter shall abridge the right of any certified teacher to join any professional association or organization, or to refuse to join any professional association or organization.

[19] Sec. 21.904 Texas Ed. Code.

Requiring or Coercing Teachers to Join Groups, Clubs, Committees, or Organizations: Political Affairs.

(a) No school district, board of education, superintendent, assistant superintendent, principal, or other administrator benefiting by the funds provided for in this code shall directly or indirectly require or coerce any teacher to join any group, club, committee, organization or association.

(b) It shall be the responsibility of the State Board of Education to enforce the provisions of the section.

(c) It shall be the responsibility of the State Board of Education to notify every superintendent of schools in every school district of the state of the provisions of this section.

(d) No school district, board of education, superintendent, assistant superintendent, principal, or other administrator shall directly or indirectly coerce any teacher to refrain from participating in political affairs in this community, state or nation.

[20] *Id.*

[21] K. Frels, Teacher Consultation in Texas, Baylor Law Rev. 243 (1975).

[22] B. Ashe and G. J. DeWolf, Procedural Due Process and Labor Relations in Public Education: A Union Perspective, 3:4 J. Law and Ed. 565 (1974).

[23] Van Alstyne, The Demise of the Right—Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).

[24] 217 U.S. 583 593-94 (1926).

[25] See note 22 *supra* at 565.

[26] 393 U.S. 503, 506 (1969).

[27] *Id.*

[28] 391 U.S. 563 (1968).

[29] *Id.* See also: *Fuentes v. Board of Education*, 24 N.Y. 2d 996 (1969); and *Moore v. Gaston County Board of Education*, 357 F. Supp. 1037 (W.D.N.C. 1973).

[30] 385 U.S. 589 (1967).
[31] See note 22 *supra* at 571.
[32] 398 F .2d 287 (7th Cir. 1968).
[33] *Id.*
[34] Dept. of Labor Bull. 1727, U.S. Bureau of Labor Stat. 37 (1970).
[35] 301 U.S. 1 (1937).
[36] 314 F. Supp. 1069 (D. Colo. 1970).
[37] 301 U.S. 1 (1937).
[38] 335 F. Supp. 395 (D. Del. 1971).
[39] *Clark County Classroom Teachers Association v. Clark County School District and Board of Trustees, Las Vegas Federation of Teachers, Local 2170 AFT and Al Triner*, 532 P. 2d 1032 (Nev. 1975).
[40] R. Phay. *The Yearbook of School Law*, 126 (1973).
[41] Civil No. SA-74-CA-39 (W.D. Tex. 1974).
[42] 404 U.S. 71, 75-76 (1971).
[43] *Id.*
[44] *Id.*
[45] *Id.* Citing *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).
[46] *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 2290, 33L Ed. 2d 212, 216 (1972).
[47] *Griswold v. Connecticutt*, 381 U.S. 479 (1965); *Shapiro v. Thompson*, 394 U.S. 618 (1969).
[48] See note 41 *supra*.
[49] See note 41 *supra* at 21.
[50] See note 41 *supra* at 11.
[51] Austin American Statesman, Sept. 28, 1975.
[52] Dallas Morning News, June 15, 1975.
[53] See note 41 *supra*.
[54] San Antonio Express, Nov. 11, 1975.
[55] *Id.*
[56] 832 2d Conn. 482 (1951).
[57] Lieberman and Moskow, 110.
[58] Andree: 147.
[59] Frels, 239.
[60] Andree, 110.
[61] See note 1 *supra*.
[62] Frels (See note 21 *supra*) 238.
[63] *Id.*
[64] 72 L.R.R.M. 2071 (7th Cir. 1969).
[65] L. C. Shaw and T. Clark, Public Sector Strikes: An Empirical Analysis, 2:2 J. of Law and Ed. 219 (1973).
[66] See note 19 *supra*. Sec. 21.904.
[67] Conclusion drawn from declining TSTA membership in 1975; also, awareness of administrator associations that TSTA/NEA promulgates legislation antithetical to management viewpoints.
[68] Andree, (see note 6 *supra*) 89.
[69] Frels, (see note 21 *supra*) 247.
[70] *Id.*
[71] 391 U.S. 563 (1968).
[72] 464 F. 2d 1147 (1972).
[73] See note 36 *supra*.
[74] See note 38 *supra*.
[75] Civil #71-468 Ala. 1974.
[76] No. C-286-WS-72, 1974.
[77] 457 F. 2d 546 (7th Cir. 1972).
[78] *Id.*

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[79] *The Houston Principals Association et al v. The Houston Independent School District* (Commissioner of Education, 1974).
[80] *Id.* at 7.
[81] *Id.* at 7.
[82] C. Perry and W. Wildman, *The Impact of Negotiations in Public Education: the Evidence from the Schools*, 30 (1970).
[83] See note 41 *supra*.
[84] Lieberman and Moskow, 92.
[85] *Id.* at 109.
[86] *Board of School Directors of the City of Milwaukee v. WERC*, 42 Wis. 3d 637, 168 N.W. 2d 92 (1969).
[89] 69 Wis. 2d 200, ____ N.W. 2d ____ (1975).
[87] 69 Wis. 2d 200, ____ N.W. 2d ____ (1975).
[88] 30:6 Wisconsin School News, 19 (1975).
[89] *Id.*
[90] *Id.* at 20.
[91] H. Full, *Controversy in American Education*, 330 (1967).
[92] *Id.*
[93] Lieberman and Moskow, 94.
[94] Full, 339.
[95] Letter from John Ryor, president, NEA, to Charles Gavin, president, Spring Branch Education Association, Oct. 20, 1975.
[96] See note 94 *supra*.
[97] Andree, 147.

LARRY ASCOUGH

School/Community Relations

One of your biggest tasks as a school trustee is to represent your constituents in a responsive and responsible manner. That isn't always easy in this era of distrust and discontent. Education is a complex subject and it faces some very complex challenges. More than ever before, how well we do at solving those problems will depend upon the effectiveness of our communications with the people we are trying to serve.

Whether you come from a small, medium, or large district . . . from a rural, suburban, or city setting . . . interaction between your schools and their publics is critical. As an elected representative, you have a responsibility to keep the community aware of the programs, plans, progress, and problems of its schools. And even more, its your job to continually keep apprised of the community's desires and wishes for its schools and children.

Unfortunately, too many boards and school districts have allowed communication to just happen in the past. Such a slipshod approach not only undermines your effectiveness as a trustee, but it also limits the efficiency of school management as well as the quality of instruction. Farfetched? Maybe. But think about it.

No organization or institution can run smoothly without good communications. School systems, which are mostly people organizations, in particular rely heavily on effective, well-planned programs of communications at all levels.

We've already mentioned the responsibility of the board of education . . . to keep the community informed about the status of its schools and to obtain community input about the running of them. The administration of a school system has a similar responsibility. It not only has to help the board carry out its job of working with the community, but it also must keep employees informed about

programs, policies, plans, and problems; and it must also involve employees in the decision-making process.

The responsibility doesn't stop there. The local school also has a communications role—perhaps the most important of all. Since most citizens are most concerned about what goes on in the school where their kids are enrolled, each school has to do its best to carry on an effective program of communications. The quality of instruction and discipline may depend to a great extent upon how much and how effectively the school interacts with the home.

Sounds like quite a job, and it is. But it's too important to approach in a haphazard manner. Whether you call it public relations, community relations, communications, or whatever, in these trying times your school system needs the best program you can fashion. As a trustee, it's your job to see that this happens. How do you begin?

There is no model that can be adopted that will assure you of PR success. Like good instruction, all communications efforts have to be individualized to meet the needs of your situation. But there are some general guidelines that any school system—regardless of size or resources—should take into consideration.

Commitment

Before your system can have an effective program, you have to give PR more than lip service. That begins with the board's adoption of a comprehensive policy on public relations. In its *Standards for Educational Public Relations Programs*, the National School Public Relations Association recommends the following:

1. *The educational organization shall commit to writing a clear and concise policy statement with respect to its public relations program.*
2. *The policy statement shall be approved through formal action of the governing body of the organization, shall be published in its policy manual, and shall be subject to review by the governing body annually.*
3. *The policy statement shall express the purposes of the organization's public relations program and shall provide for the delegation of such authority to the executives of the organization as deemed necessary to facilitate the achievement of such purposes.*
4. *The provisions of the policy statement shall be made known to the entire staff or membership of the organization through all appropriate means. As a minimum, the provisions shall be published in the personnel handbook or other publications of the organization.*
5. *Commitment to the achievement of the purposes of the organization's public relations policy shall be demonstrated through*

the allocation of adequate human and financial resources to the public relations program.

While a policy statement may not sound like a big item, certainly you wouldn't expect administrators to carry out any program without policy authorization and guidance. If you don't already have such a policy statement, a sample policy from a district follows this article for your review.

Obviously, commitment means more than policy. As the NSPRA statement suggests, the real commitment must come in the form of adequate resources—both financial and human—to see that the program is carried out. No job can get done unless someone has the responsibility, and certainly there has to be enough funding to carry out the necessary tasks. Again, the extent of staffing and resources will depend upon your size and needs, but regardless, someone must be responsible and given some support.

The NSPRA Standards publication has suggestions in both terms of staffing and resources. You might want to consult it when considering your needs. Meanwhile, a sample job description is included with this article for your perusal.

Commitment goes a little deeper yet. Even with policies, a staff, and budget, the job won't get done unless everyone in the system knows he has a role to play in the PR process. Administrators have to promote good PR, as well as reflect it in their jobs and actions. Other employees, from the boiler room to the classroom also have a responsibility. There are those who say the biggest PR agent in a school system is the school secretary. The point is, a part of the commitment is to see that employees are aware of their PR responsibilities and that staff training is provided so that they will have the skills and tools to effectively handle the duty.

Planning

In its statement of standards, the National School Public Relations Association provides the basic, modern definition of school PR:

"Educational public relations is a planned and systematic two-way process of communication between an educational organization and its internal and external publics. Its program serves to stimulate a better understanding of the role, objectives, accomplishments, and needs of the organization. Educational public relations is a management function which interprets public attitudes, identifies the policies and procedures of an individual organization with the public interest, and executes a program of action to encourage public involvement and to earn public understanding and acceptance."

The key words are found in the first sentence . . . *PR is a planned and systematic two-way process of communication.* If your district's efforts are to be worth your investment of resources, its your job to

see that proper planning takes place. A written, measureable plan should be in existence on a district-wide basis, as well as at each school. The following should be considered in putting your plan together:

- *Assess needs*: Start by determining what your communications needs are, how well you're meeting them now, and what new things you should do to meet them.

- *Consider district goals*: Whatever you plan to do, it should be based on the overall goals of your district. For example, it wouldn't make much sense to focus on PR for the athletic program if your district's major objective is to improve reading and math. And hopefully, you will keep your plans student and instruction oriented.

- *Involve all publics*: Your plan should not overlook any of your key publics. Parents, students, employees, community leaders, the news media . . . they're all important. And if you want to be most effective, involve some of them in the planning process.

- *Vary activities*: Obviously, the vehicles you use to communicate must be individualized to meet your specific needs. But one thing's for sure, you will need a variety of activities to meet the needs of your many publics. Make sure you have a regular written vehicle that is targeted to a specific audience. Opportunities for face-to-face communication as well as involvement activities are a must. And don't do all the talking, listening is a key part of communication too.

- *Develop measurable activities*: An all out effort must be made to specify the desired results of your PR plans. Without this element, it will be difficult to keep the program on track as well as assess how well the objectives are accomplished.

- *Assign responsibility*: It really doesn't help much to have well developed plans unless someone has the job of seeing that they're carried out. Accordingly, the plan should specify who is responsible for what, and when it will begin and end.

Evaluation

One of the key words in education these days is accountability. It certainly applies to the public relations program. Those who don't understand its importance will question a school system even spending time, effort, and resources on such a frill. That's a good reason in itself to make sure your PR efforts are on target. But since we already agree it's necessary and worth doing, the real reason to evaluate the program is to keep it meaningful and on target. While that's a job of the administration, it's your responsibility to insist that it gets done.

How do you make sure your PR program is working? First, you've

got to make sure you've taken heed of the preceding recommendations. If you've done that and your program is operating, you might want to consider the following:

- *Appoint a review team*: A regular meeting of a representative group that will help assess your efforts can be productive. This applies to both your district-wide plans as well as the building level. All the publics you are trying to reach should be included in the group. Focus the agenda on the objectives called for in the plan.
- *Conduct surveys*: There should be a regular attempt to sample the publics your communications vehicles are aimed at. Readership surveys should be made on all major publications to make sure they're on target. At least an annual audit should be made of the opinions and awareness of your major publics. Periodic efforts should be made to assess the effectiveness of all meetings and involvement activities through surveys, feedback sheets, and interviews.
- *Monitor incoming communication*: There are indicators everywhere of how well your PR program is doing. The Board of Education meeting is a good barometer. How well attended is it . . . and what kind of reaction do you get from patrons and employees who appear? Ask the staff to systematically monitor telephone calls, letters, visitor attitudes, news coverage, and the like for PR implications.
- *Make program modifications*: It really doesn't help to evaluate your program if you aren't going to make necessary changes. So when your feedback indicates that an adjustment should be made, by all means make it.

HELP!!!

That's about it. You now know that you have to provide the commitment, planning, and evaluation if you're going to have an adequate PR effort in your school system. That leaves the biggest element of all: implementation. But as it has been pointed out several times, the details for what works best for you have to be worked out according to what your needs are. If your district will include the previously suggested elements and provide the necessary blood, sweat, and tears, we promise you will be well on your way to improved PR.

As mentioned earlier, several resource items are included with this article that you may find useful in your efforts. If you desire other help and assistance, try any and all of the following: The Texas Association of School Boards, the Texas Education Agency, the Texas Chapter of the National School Public Relations Association, and the National School Public Relations Association.

And remember, if you want good communications tomorrow, start planning today.

STATEMENT OF POLICY

RE: *Communications and Community Relations*

Effective communications between the school and its citizens is crucial for the development of mutual understanding, respect, and confidence. The successful operation of any educational institution depends upon the cooperation and participation of people. The ability to cooperate depends upon the confidence in, and the understanding of, the purposes and values of the institution. The Board of School Trustees for the _____ Independent School District shall consider it both a legal and moral obligation to interpret the schools to the people.

The Board of School Trustees further recognizes that the problem of interpretation is twofold. The community and its needs must be interpreted to the schools, and the schools must be interpreted to the people.

Many channels are available for the establishment of a two-way communications system. The Board of Trustees sees the Superintendent of Schools and/or his designates as the most practical medium for receiving and disseminating information about the schools.

Authority is hereby delegated to the Superintendent of Schools and/or the Division of General Administration to develop procedures whereby this policy may be made effective.

JOB DESCRIPTION

ADMINISTRATION

Director of Communications

The major function of the Office of Communications is to provide a total information system. The Director will be responsible for planning, developing, and implementing a continuous program of inter-school, school-community, and school-state-nation communications service. Major activities are to:

1. Establish a two-way communication system within the school system, between the school system and the community, and between the school system and state and national groups.
2. Interpret policy of the Board of Education and the program of the school system to the public.
3. Plan, develop, and produce internal and external publications.
4. Prepare feature material for newspaper, radio, and television.
5. Assume the role of liaison person with all news media.
6. Assist school personnel and Board personnel in planning public participation events.
7. Provide school-community relations consulting service to Board of Education members, central office administrators, and school principals.
8. Help assess public attitude and keep appropriate school personnel informed.
9. Serve as a source for information to individuals from the community regarding school matters.
10. Serve as a consultant in the preparation of informational materials prepared by school personnel.
11. Assimilate and disseminate informative materials.
12. Evaluate informative materials produced by the school system in terms of their internal and external communicative effectiveness.